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FACULTY OF LAW

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## The Narrative Subject of Law: An Introduction to and Outline of a Long-Awaited Turn in Law<sup>1</sup>

**Abstract:** In this article, we argue that the current concept of the legal subject should be expanded to include narrative identity, in other words that the narrative subject of law should be recognised. With this aim in mind, we firstly (i) identify the philosophical assumptions and tools necessary to articulate the thesis of *homo narrans*. We find them in Martin Heidegger's work *Being and time*, where he made a groundbreaking contribution to twentieth-century philosophy by deconstructing the concept of the subject. Then (ii) we discuss the key theoretical-legal assumptions and tools related to the legal turn we advocate, and finally (iii) we indicate – provisionally and in broad outline – the key consequences of recognising the narrative legal subject of law in the justice system.

**Keywords:** Anthony Giddens, law as a medium of communication, legal positivism, Jürgen Habermas, Martin Heidegger, narrative subject of law

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## Introduction

Narratology, an interdisciplinary field belonging to the main discourse of the humanities, and having a strong presence in the social sciences, has undergone dynamic evolution since the narrative turn, a shift identified with Roland Barthes' groundbreaking 1966 publication on the structural analysis of narrative (Barthes, 1996). Hence the central thesis of narratology – that human beings can be described as *homo narrans* (Fisher, 1984; Victorri, 2002), an idea that was once considered radical – is nowadays viewed as rather uncontroversial. From a philosophical perspective, the development of narratology is a multifaceted consequence of the deconstruction of the concept of the subject performed by Martin Heidegger in 1927, in his classic volume *Being and time*. Narratology is also greatly indebted to Hans-Georg Gadamer's project of hermeneutical philosophy and his idea of effective history (*Wirkungsgeschichte*), elaborated in *Truth and method* in 1960. Although contemporary research in the humanities and social sciences obviously offers multiple fresh insights, all of them with significant projections in the arena of juridical discourse, it continues to draw on past achievements, including those of the aforementioned philosophers.<sup>2</sup> It also draws on the concept of communicative action, first presented in 1981 by Jürgen Habermas, who in his youth was inspired by the depiction of the public (*Öffentlichkeit*) in *Being and time* (Habermas, 1984). The concept of communicative action has made a comeback in sociology, for example in research on the instrumentalisation of interaction partners and/or their positioning (Björninen et al., 2020), mainly due to the so-called new media, especially when people are engaged in two analytically distinct activities: storytelling and narration.

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2 As far as the consideration of narrative rationality in general is concerned, the plurality of these projections forces us at least to add the inspiring contributions that we owe to Greimas, Ricoeur, MacIntyre, and Lyotard (this one conjugated the latter together with Foucault and Derrida). Creative assimilations of these unmistakably heterogenous idioms in the legal (meta-dogmatic) arena take us, in fact, from Bernard Jackson's and Eric Landowski's narrative structural semiotics to James Boyd White's ethical-literary narrativism (opening the door to the blossoming of the law and literature and law and performance movements), passing through Costa Douzinas' philosophical-political use of grammatology and Goodrich's critical rhetoric, obviously without forgetting the role that community-building counter-storytelling assumes in so-called narrative outsider jurisprudence (from critical race to postcolonial legal theories, passing through feminist jurisprudences and LGBT critical studies). We should also not forget that narrative rationality is often considered one of the plausible contemporary assimilations (beyond those we owe to topic rhetoric and new hermeneutics) of practical-prudential (subject/subject) rationality, if not as an 'attempt to recapture Aristotle's concept of *phronesis*' (Fisher, 1994, p. X). For a brief consideration of some of these projections and their irreconcilable idioms, see Linhares (2013, pp. 3–20; 2022, p. 83 ff., 86–90; 2023, pp. 47–60). See also volume 3 of the journal *Undecidabilities and Law*, the thematic core of which is precisely 'justice as translation and counter-storytelling'; <https://www.uc.pt/en/fduc/university-of-coimbra-institute-for-legal-research-uciler/undecidabilities-and-law-ulcj/>.

In light of the above, at this point the reader would have good reason to ask this basic question: what is the relevance of writing about narrative subjectivity 58 years after the narrative turn and the birth of narratology? After all, contemporary social science largely focuses, on the one hand, on the positively connotated ability to tell stories (storytelling) about events significant to individuals or groups, and, on the other hand, on narratives with negative connotations. It is said that narrative articulates not so much the course of events as the ambitions, desires, or motivations of the narrator. It is therefore linked, at least potentially, to ideology, thus narrative is susceptible to instrumentalisation and ‘strategic uses of counter-narratives’ (Mäkelä & Björninen, 2022, pp. 11–23). Here we should point out that storytelling skills have been glorified in marketing since the 1980s: if the company’s story is told in a way that leads to the articulation of its mission, the target audience will be more likely to identify with it. Furthermore, storytelling is crucial even in the preparation of integrated financial reports, for which the narrative form is an ‘integral component of reporting’, enabling stories to be told about the company’s sustainable development, thereby allowing the company to reach society and its members (not only in their role as company customers, but as people or citizens), (Kobiela-Pionier, 2018, pp. 100, 119).

So we can reformulate the main research question: what is the significance of writing about narrative subjectivity in law in our times? Well, in our view, the examples just mentioned of the narrative understanding of oneself and the world demonstrate how urgent the need has become to take a turn in law that introduces the concept of narrative identity into the justice system. However, in an effort to treat this endeavour seriously, and bearing in mind the limitations resulting from the fact that this is an introductory article to the topic, we will focus on the most important philosophical assumptions rather than on current debates from the entire field of humanities and philosophy.<sup>3</sup> These philosophical-theoretical assumptions and tools will allow us to indicate the key assumptions and the required conceptual-theoretical redefinitions of the proposed turn in law, focused on the narrative subject of law.

## **1. Philosophical assumptions and tools: The deconstruction of the concept of the subject and its consequences**

Perhaps the most significant philosophical issue associated with Heidegger is the examination of *being*, as opposed to *entity*. This was, of course, a radicalisation of the

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3 We would like to thank Reviewer 1 for their comments on the sociology of law, which, however, is beyond the scope of this article. At the same time, anyone interested in taking a more in-depth look at the issue, taking into account the researchers we have only mentioned and the sociological tradition that developed after Heidegger, is encouraged to read the monograph by Bartosz Wojciechowski, *Narrative identity as a condition for authentic legal subjectivity*, to be published by Springer in 2025.

phenomenological investigations made by Edmund Husserl, focused on how what exists presents itself to us and how it exists. Because this is an important issue for the proposed turn in law, let us note that in the world we know, better or worse, there are people, there is Valhalla, there are centaurs, there are numbers, triangles, and squares, and even tables and chairs, around which we directly or through electronic means of communication, such as computers (which are also part of our world), discuss, read, watch movies, etc. Indeed, Valhalla, with its brave Norse warriors is – just like the land of eternal hunts of American Indians or ancient Hades – something that exists in our world – it just exists differently than the tables and chairs we use when reading about these creations of the human imagination. There are also triangles, squares, and numbers, which we tend not to view as creations of the human imagination, but rather as discoveries of the human mind. Very generally speaking, we can see that what we learn about, talk about, read books or watch movies about (not to mention conducting research about!), differs in the way it exists. But, as Heidegger points out, the issue here is not existence in the sense of real/unreal or figment of imagination/scientific discovery, but rather the richness of aspects related to this different way of existence. Put simply – the chief issue is these different ways of existence.

### **1.1. Temporality, not the linear points of clock time, determines human existence**

With human beings, what is crucial is that they are not present as points in a Cartesian coordinate system; instead, they live. Of course, other living beings also live, but humans live in the manner of occurring (*geschehen*) (Heidegger, 2010, p. 19 (the first paragraph of the paragraph § 6)), emerging, and becoming. People are born as children, their development is taken care of from the very beginning, bringing joy to parents – even if it also gives rise to concerns; later they become teenagers, with whom difficult conversations are held at home, at school, etc., or conversations are held on difficult topics; then they become adults who are always very busy with work, home, social, and other matters. They are people who have hopes and dreams; some are frustrated, some are engaged in various initiatives, while others shy away from the noise of the world and try to remain detached individuals. In the meantime, they become parents, and grandparents – and they wonder (or try to escape from such reflection) why life has turned out like this and what they should do about it. With the temporality of human being, the key thing is not a simple change – like the cogs turning in a clock. What really matters is human becoming, since it is here that we can exert some significant influence.

### **1.2. People understand – themselves, others, and the world – because they talk**

This temporality is bound up with understanding, or in more precise Heideggerian terms, the *project of understanding* (after all, human existence has a tempo-

ral character, not a ‘point-based’ one, because none of us is a ‘presence’). Thinking in terms of a project, i.e., focusing on one’s future, which is shaped but not determined – let’s do this-and-that now and ‘see what comes of it’ – is fundamental for human beings. It precedes the conceptual thinking that demarcates something from something else and suppresses connections; the kind of thinking of something/someone in a way that defines (preferably through a list of attributes) and thereby temporally specifies and semantically closes its object. Because understanding, by coming full circle and establishing a perspective, opens us, immediately opens us up to the world; and within this world, always to other people, to various things we do with them, for them, or just without them; to our everyday life, to exceptional moments and life breakthroughs that we perceive from an open perspective thanks to their interconnectedness. Understanding opens up wide perspectives immediately – it does not close, does not seal, does not define ‘once and for all’, unless we are in the morgue being examined in an autopsy. And this opening is the decisive moment of the deconstruction of the concept of subjectivity.

This deconstruction of the concept of subjectivity – a concept that is inherently inadequate, because it grasps who people are – and above all, how they are – in a fragmentary and piecemeal manner – also implies a change of key metaphors, and of terms specific to human activity.

The key point here is that in everyday language we say ‘I see’ to mean that we understand something. So, originally, seeing refers to and means understanding (Heidegger, 1980, p. 56 [De 32–33]). Secondly, it is important to bring metaphors associated with hearing into play, and when describing the relationship with another person, to replace visual metaphors with metaphors associated with hearing. This brings to light the assumption which for centuries – at least since the time of Descartes – prevented philosophers and scientists from reaching the other: the body–soul dualism. And in Heidegger’s conception, the other is not a body with a *locus* in their head, which one has to reach in order to read their thoughts, but which remains inaccessible. Rather, the other is a way of understanding the world, and the others in it – including oneself, and it would suffice to simply talk to them. One would like to say something, just to talk like a human and ask how they are doing. Because the other person can be understood – we are able hear what they are saying to us; and when one does not see them or understand their language, one can try to understand them in the basic categories of their everyday concerns. After all, like us, they care about their world, their life, and their loved ones. They are, 24/7, a psycho-physical and cognitive-affective unity (Heidegger, 2010, § 29 ff.), thanks to and through understanding the world and engaging in it: drinking coffee or juices, sleeping, walking, or driving to work – and also while reading this article. ‘Dasein finds “itself” proximally in *what* it does, uses, expects, avoids – in those things environmentally ready to-hand with which it is proximally *concerned*’ (Heidegger, 1980, p. 155 [De 119]).

And that is why the ‘trying to understand the other person and theirs concerns’ reflects the projective character of understanding.

Talking, discussing something, is, in the proper sense: ‘letting something be seen in its *togetherness* [*Beisammen*] with something – letting it be seen as some thing’ (Heidegger, 1980, p. 56 [De 33]). So changing the metaphor serves to show that thanks to talk and the projective character of understanding, which opens certain perspectives for us, we ‘by our nature’ already understand what we see thanks to and through a connection to something else, and with reference to it. Neither we nor anyone else, nor things in the world, are by their nature isolated, separate, devoid of connections and relationships. To understand something means linking it with something else and seeing the context of connections in which it operates. This interlinking allows us to see something *as* something, and the way of relating to someone *as* someone like this-or-that. Individualisation and the shaping of this something is a process always taking place through (and in) a structure of significance, the structure of potential meanings that we invoke and shape in given contexts, by virtue of what is important – and how. We are with others, and we tend to understand other people precisely through the prism of such mediation in relation to the world, in caring for this world, in contexts and various open perspectives.

In this approach, shaping and understanding the seeing of something *as* something has little to do with the well-known category of truth, because here nothing is put together, collected, contrasted, or related to anything else for the purpose of juxtaposition. Here the truth is originally understood as *aletheia*, that is, the unconcealedness or unhiddenness taken as the activity of Dasein (as being-in-the-world)<sup>4</sup> of disclosing the things for our understanding – how we understand them – that guides our everyday concern. Because here the most important thing is the disclosing and perceiving of specific mutual references and interconnections between people and their everyday affairs; as well as the determining of which aspects, from which perspective, due to what is particularly significant for us, we perceive them most often, or in the most important moments.

### **1.3. People shape their lives as they understand them**

The disclosure of Dasein – simply us, people, each of us – is associated with the fact that we ourselves make sense of our lives, of course, by shaping relationships with other people, both individually and collectively, for quite different purposes, manipulating in every way entities that are, of course, not us. ‘Yet man’s “*substance*” is not spirit as a synthesis of soul and body; it is rather *existence*’ (Heidegger, 1980,

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<sup>4</sup> We are very grateful to Reviewer 2 for their important comments on the terminology which we draw on above. At the same time, we would like to clarify that certain simplifications are intentional – both philosophically and legally – and their purpose is to enable the two parts of the article to relate to each other conceptually and remain readable.

p. 153 [De 117]). We shape our existence – we do not choose our existence from a set of available options, like answers on a test.<sup>5</sup> Human beings are not in the world as a constant presence (Heidegger, 2010, § 21). Generally speaking, they are rarely present – because they are usually engaged in the concerned overview of ready-to-hand entities, that is, they simply act in the world: carrying out tasks, resting after their completion, or discussing them with others, and devising ways to start or free oneself from them. And what we do changes the world, others – and ourselves in turn. Thus, we make sense of our lives and of being with others.

The human being acts in the world always already in the way of being with others, and demonstrating the ‘presence’ of others has always been a somewhat strange manoeuvre, because others have been collaborating with us all this time. ‘By reason of this with-like [*mithaften*] Being-in-the-world, the world is always the one that I share with Others. The world of Dasein is a *with-world* [*Mitwelt*]. Being-in is Being-with Others. Their Being-in-themselves within-the-world is *Dasein-with* [*Mit-dasein*]’ (Heidegger, 1980, p. 155 [De 118]). When asked who we are, we usually respond by recounting how we relate to others, how they have related to us so far – the way we interact with them, or how we cope with the fact that things are not going well with others. Thus, the outcome of the deconstruction of the concept of subjectivity is perceiving people together with others – in comparison with others, in the context of others, in relation to others, and so on, and sometimes even in opposition to them. Others co-determine us, when we do various things together with them – whether this involves family matters, professional life or hobbies. At the same time, however, we largely choose these others. Largely – because, after all, we do not choose where we are born and raised, nor our primary school, nor the circle of people who will have a decisive influence on us – whether this influence aligns with how we wish to shape our lives, or is one that we resist and thereby determines how our lives are shaped, or is one that makes us feel helpless in the face of the possibilities (and necessities) involved in shaping our lives.

The shaping of our own lives is not arbitrary: it requires various efforts and endeavours on our part if things are to turn out how we want them to, at least in rough outline. We are always somehow thrown into a situation and situated there; we see what we see from the perspective of our situation and in the process of becoming someone. We tend to draw on the past tense to construct the history of the times and place we lived in, and as an interpretive resource for shaping the world and our understanding and life project with others. For example, a Native American from Idaho or Montana will assess the Industrial Revolution of the 19th century differently than a Briton, German, or even a Pole, although, along with residents of countries

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5 ‘Philosophy is universal phenomenological ontology, and takes its departure from the hermeneutic of Dasein, which, as an analytic of *existence*, has made fast the guiding-line for all philosophical inquiry at the point where it *arises* and to which it *returns*’ (Heidegger, 1980, p. 62 [De 38]).

in Central Asia, Central Africa, or even Central Australia, they may share a common vision and even project for a healthy and ecological life on Earth in, say, 50 years.

Heidegger made the following assertion: ‘In clarifying Being-in-the-world we have shown that a bare subject without a world never “is” proximally, nor is it ever given. And so in the end an isolated “I” without Others is just as far from being proximally given’ (1980, p. 152 [De 116]). From a phenomenological perspective, this is a crucial moment in defining objectivity, which, as we recall, has been understood as *intersubjectivity* since Edmund Husserl, and this is always mediated in the world in which we act together with others, or alone – though even then others are taken into consideration.

We can work together with others, just as we can enjoy our leisure or lives with them. Who we are, our identity, is not a matter of aggregating traits that seem characteristic to someone from a particular perspective at a given moment. Firstly, such a perspective would objectify us by denying us a voice and agency in the matter most crucial to us, namely our very own existence (Björninen et al., 2020).

Secondly, this perspective would objectify us by likening us to a set of traits – rather than treating us as a person who becomes someone in life because they understand their life, others in it, and the world somehow; and who expresses this understanding through the way they live their life. As long as a person understands, they remain disclosed (to the world, to others in the world) and are never constituted by a set of determinations. Due to the richness of personality and the multifaceted nature of understanding the world, they always transcend one-dimensional and aggregative apprehensions of it.

Therefore, identity is – in broad strokes – a matter of how one lives with a specific group of people in a place that is defined historically, culturally, politically, even geographically, etc.; fulfilling dreams and realising plans, i.e., carrying out various activities on a daily basis, be they institutional, personal, or professional; how one realises various projects associated with one’s dreams, ambitions, aspirations, or how one fails in such endeavours – and then how one deals with it in existential terms, whether one copes or not... and this is what one wants to say, or even shout in others’ faces.

## **2. Theoretical and legal assumptions: Breaking the dominance of the monological approach**

### **2.1. The need to overcome monological law**

In Europe, the prevailing understanding of the legal system owes much of its perspective to normativism – or the survivals, more or less transparent, of normativism (some of them significantly beyond the positivist ‘field’) – which essentially entails thinking of the law as a system of norms requiring analytical precision in conceptual formulation. If the rational legislator fails to imbue the system of norms with the

necessary precision (Cern, 2019; Zirk-Sadowski, 1990, p. 432 ff.), the legal doctrine should step in to ensure that law is an expression of human rationality. The legal system should be free from unnecessary values – unnecessary as they generate pointless doubts and discussions; it should be hierarchical, precise, and complete, or entire, as well as non-contradictory, or coherent (albeit admitting distinct modes of consistency and/or coherence). The discursive nature of law is, of course, guaranteed systematically, through the appellate and control procedures applicable to decisions made in each branch of law.

However, the monological nature of law referred to here concerns the relationship between law and the legal subject, or its addressee. The latter, when confronted with the authority and power of the legal system, can at best respond to questions and fit themselves into one of the available conceptual sets of precisely defined legal terms. What needs to be highlighted here is the closure of legal concepts, since no room is left for otherness, difference or transformation, for discussing and indicating what was and is important, and why, for the legal subject as the addressee of the law. Law, with its characteristic analytical inclination towards the semantic closure of concepts, does not leave room for its addressees to articulate and discuss a plurality of views (Rawls, 1996).<sup>6</sup> Thus there is no opportunity to make a decision that best satisfies the articulated arguments in the face of the law, taking into consideration what is significant, what people hold to be of the greatest importance – because what is said in the face of the law either has a predetermined legal meaning (into which the statement fits), or, roughly speaking, has no legal significance. In the former case, the addressee of law is not an autonomous source of meaning and sense but, as we assume about law with a claim to justice, is merely an autonomous decision maker when it comes to which of the presented conceptual options applies to them.

In other words, the prevailing paradigm of law employs the concept of the subject, which is oriented towards the semantic (and, of course, obligatory) closure of questions about the ‘who’ of legal subjects. Heidegger accomplished the deconstruction of precisely this concept of the subject in 1927, 97 years ago. The concept of the subject, which out of respect for legal values is subordinated to the concern for the hierarchy, completeness and entirety of the legal system, is associated with a certain ostentatious indifference of law to non-legal values, known as the neutrality of law. However, this neutrality distances the legal system from what is meaningful, significant, and valuable in the lifeworlds of subjects of law. Thus, to a certain extent and within a certain scope, it objectifies them in the name of the system of the most consequential legal norms.

This leads to the partial instrumentalisation of legal subjects, who are encapsulated in rigid legal schemas and conceptions about what it means to be an ordinary,

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6 When we write about pluralism, we assume, following Rawls, that the views held are characterised by a claim to reasonableness and comprehensiveness, hence they are inclusive.

modest human being. The everyday life of this ordinary individual – their concerns, the way they build relationships, and, on this basis, their earnest process of becoming someone other than they were before – is pushed into the background. It is in this sense that legal subjects can be said to lack a voice: they are unable to tell their stories in a meaningful way, they can only make choices within a closed universe of meaning. They are, at least in some cases, trapped in the rigid legal perspective of the concept of the subject of law, a concept which is precisely designed to close off the disclosure of Dasein through the multitude of lawyer-assistants to the legislature.

## **2.2. Law as a medium of communication**

According to Habermas, law is a medium of communication, because (simplifying massively) it ‘joins forces *from the outset* with a communicative power that engenders legitimate law’ (1999, pp. 126–128, 149). As a medium of communication, law institutionalises and thereby stabilises mutual expectations regarding the behaviour of its addressees – though from a democratic perspective, it does so only temporarily. Subjects of law should always understand themselves as authors of law. Thus law, as a medium of communication and a means of reaching consensus among citizens, should be open to contemporary individuals who understand themselves – having had this philosophical and cultural awareness for several decades – as a certain challenge, as a project that they can undertake and autonomously shape, while always being situated in some way.

From this perspective, both norm-shaping activity and the application of law should be perceived in the context of, and in some connection to, the framework of communicative activity, cultural production, and the discursive resolution of dilemmas or problematic situations. It is also important to recognise the historicity of concepts reflecting the historical nature of human life (Palombella, 2009, p. 9). Communicative action, by virtue of its communicative nature, is associated with the practices of speaking and listening, understanding and interpretation; it has an open character, and even entails opening up, disclosing to the other, thus it entails the inclusion of the other, hearing the other during the mutual definition of the situation (TCA, Vol. I). We argue in favour of such an ‘attentively listening’ openness and disclosure (*not* arbitrariness) in legal matters. We call for an openness of the legal system that will allow the subject of law to be heard, so that the events and individuals that have shaped their life can be taken into consideration. This always implies speaking about important people and events that have made them who they are and who they want to be – or, perhaps, who they are no longer able to be.

## **3. What is the proposed turn in law?**

Anthony Giddens focuses on the relationship between individual identity and modern institutions, arguing that the reflexivity of modernity reaches the very core

of the self. The self thus becomes a reflexive project, based on the structure of understanding. However, this self as a project, an idea introduced by Heidegger in 1927, is clearly influenced in modernity by institutional changes. Giddens writes: "modernity radically alters the nature of day-to-day social life and affects the most personal aspects of our experience. Modernity must be understood on an institutional level; yet the transmutations introduced by modern institutions interlace in a direct way with individual life and therefore with the self" (1991, p. 1). Modern institutional reflexivity means 'the regularized use of knowledge about circumstances of social life as a constitutive element in its organization and transformation'. It influences identity by mediating its construction with an institutional dimension (1991, p. 20 ff.). This means that personal and social transformations are intertwined, and that law is an inseparable part of them. Giddens, like Heidegger, albeit decades later, argues that the modern individual shapes their identity precisely through personal relationships with oneself and with others, and through the ability to reflexively direct one's own life in a way that takes into account the transformations of reality and institutions. In other words, managing one's own life has the character of a project modified according to one's understanding of the world in which one lives, as well as one's aspirations, ambitions, plans, etc.

On the other hand, it is a profound challenge for modern institutions to become and remain reflexive, that is, to enable, strengthen and protect the capability of individuals to autonomously and reflectively shape their own lives as an authentic and unique project, to safeguard this project from the dehumanising uniformity or objectification that characterises mass societies. This process should be associated with empowering individuals by granting them certain rights, and by assigning them duties and responsibilities for their actions.

This means that personal identity is a right that is bound up with being human. The right to identity implies the right to psycho-physical integrity, as we are neither solely thinking beings – like a brain in a jar – nor solely feeling beings. Each of us is an integrated whole that interprets ourselves, others, and the world in which we live, where we act alongside others; and based on this, desiring something, finding joy in something, or being unable to derive joy from life in the world with others. As an integral person open to the world through understanding, each of us must have the guaranteed right to cognitive-affective integrity, to comprehending in an interconnected manner both the ways in which we know ourselves, others, and the world, and how we feel about ourselves in co-shaped relationships.

The ability to shape our identity requires not only the right to psycho-physical integrity, and thus cognitive-affective integrity, through which the project of understanding ourselves and others in the world can be developed by us, but also requires – due to the essential way of being human, that is, as already situated in geographical-cultural terms – the right to historical-cultural integrity (Wojciechowski, 2010, pp. 38 ff., 176 ff.). Human beings as beings that become, rather than points of occupied

time or aggregates of timeless traits, already somehow understand themselves in the world. That is to say, the world and others in the world of everyday concern have always been a basis for partial self-understanding for each of us. The world – which a person found themselves in and supports, or which they abandoned because it was intolerable and they had to flee, or in which they decided to stay in order to change it – is an integral and therefore fundamental element for shaping a certain project of self-understanding; or rather self-transformation, because being a human that becomes who one is simply means that our self-understanding changes along with our becoming. Thus, the project of our understanding and the events that shaped us – including the meanings of the language or languages in which we think, our categories of family, friendship, work, ambition, peace, and the significance they have for us and our loved ones – also change.

The most contemporary, pressing, and urgent examples of projective understanding in the world include issues such as intergenerational justice, and the right to preserve nature, healthy and clean rivers, forests, and so on. The idea of recognising that nature has legal personality has been circulating for many years in proposals for a new approach to ecology. Recent years have brought concrete developments in this regard. In various places around the world, there have been attempts to grant rivers (and other natural phenomena) recognition as distinct legal entities. While this is not a universal trend, a few such cases can be identified in existing legislation. From a purely legal perspective, the reasonable arguments regarding the extension of the concept of legal personality to elements of the environment deserve attention. Nature requires protection, and in order to receive it, it should be granted legal personality and its own independent rights, which would mean that entities harming nature could be sued and made to compensate. Such developments indicate the need for new approaches that pay particular attention to cutting-edge conceptions of the personhood of natural phenomena, and the necessity of developing biocentric or eco-centric jurisprudence.

As is evident from the above, various relationships can be cultivated between people in the world, ourselves, and also towards the natural world or the world in general, making it particularly important to have the right to ethical-moral integrity. However, in our view, the optimal approach would be to ensure that law provides the conditions for the development of ethical-moral capabilities. This encompasses the right to develop ethical-moral sensitivity, a sense of justice, mutual care for oneself, the ability to articulate and demonstrate such capabilities, and to organise socially and institutionally for their sake. Ethical-moral capabilities enable us to deepen our understanding and cultivate a competently evaluative existence in the world with others – that is, being affirmative, critical, or engaged in recognising ethical-moral dilemmas – as well as a competent norm-creating existence in the world, involving formulating certain justified constraints or rights for the sake of ensuring our dignified coexistence. This should be a coexistence worthy for us and for others, wherein

the dignity of each of us requires the right to independently, autonomously determine who we are and who we are not, and how we understand ourselves in the world with others – not just to define oneself within a space predetermined by concepts over which we have no influence. What is particularly at stake here is the right to present one's identity through narrative. Such presentation is crucial for the possibility of meaningful self-expression – and only such expression empowers oneself and returns or safeguards one's agency in the world with others. And because agency is at stake here, respecting the rights to psycho-physical, cognitive-affective, and historical-cultural integrity is crucial for its consolidation and reinforcement.

Storytelling and narration express the fundamental need that each of us has: to be heard, listened to, and acknowledged, whereby the latter integrally relates to both the cognition and affect focused on us (Wojciechowski, 2023, p. 135 ff.). Consequently, this need to be heard, listened to, and acknowledged involves creating and narrating stories to others, and ourselves, about who we are in the world as we know it. It is crucial for legal subjects to realise that such storytelling is part and parcel of everyone's everyday life, covering concern and care about oneself, others, and things we encounter in the world, which is familiar to us, thus no sphere of our existence is excluded from the scope of such narratives. Therefore, we can become entangled in the life stories of other individuals, such as grandparents, parents, neighbours, friends, or even the stories of simply fellow citizens, travellers, who often enter our daily lives unnoticed, and sometimes unintentionally, but we suddenly meet them while co-doing and cooperating on something. To repeat Heidegger, an individual subject as an object of analysis and cognition is a secondary concept to each human in their everyday concern and care with their own life and, in this life, with other people with whom they do things – and on this basis understand the world they live in. As one may see, telling the story of one's life is also telling the story of the world one has been thrown into and tried to do something about; of the people we have encountered and with whom – in opposition to them or because of them – we tried to do something.

Therefore, we may say that nothing seems more natural and universal to the human individual than telling stories (Miller, 1990, pp. 66–79). We tell stories because only in this way can we capture the flow of time and events in words in an original way that helps us understand ourselves our transformations and the world around us. Storytelling is one of the most important and widespread forms of shaping texts; not only linguistic texts but also cultural products, including law. Law, like culture, constitutes a network or intertwining of mutually defining and conditioning phenomena, meanings, gestures, or artifacts.

The narrative identity of the human individual allows the model of subjectivity to be expanded by incorporating and emphasising the role of factors that, in the traditional paradigm, stand in opposition to what is rational and universal – in particular social and cultural conditions, temporal and procedural elements, as well as that which is personal and belongs exclusively to the individual. As noted by Charles

Taylor (1989, p. 47 ff.), a prerequisite for the emergence of a shared world and, subsequently, a coherent, shared narrative, is the existence of common values, goals, and ideas that can be defined as somewhat external to the individual: human dignity, authority, human rights, or fundamental rights. For we are members of a society, and law is a medium through which the unique expression of the individual can be realised. For a person to take an authentic and active part in social life, basic values are required – including truth, freedom, and justice, which guarantee a harmonious social life; as well as a language in which they can be expressed, especially the language of legal acts or judgments concerning specific legal issues.

Understanding a person's authentic legal subjectivity is not possible without grasping the relationships connecting the subject with their personal identity – understood as that which makes us the same person at any time, place, and context, albeit certainly not with an unchanging identity. Narrative identity implies change – for instance, five years ago, I was still a woman, and now I feel that I am someone else. To comprehend the contemporary individual and their reactions to a constantly and rapidly changing social reality, we must turn towards human identity. When enquiring about personal identity, we are asking about what is essential to the person as an individual, focusing on the factors that enable the individual to be themselves, despite the numerous changes experienced as an empirical entity enduing over time, and thus ageing, changes in appearance, weight, hair colour, or even sex (Garrett, 1998, p. 306). We are also enquiring about the potential of a person to act in specific conditions, about the interactive competencies of the individual that can be manifested in human relationships. This is crucial when considering the legal recognition of a subject, as it involves individual subjectivity and, more specifically, what sets a particular individual apart from others and allows them, in a legally protected manner, to enter into specific relationships with other subjects.

As we have just argued, an understanding a person's authentic legal subjectivity is not possible without grasping the relationships connecting the subject with their personal identity. As relevant as this acknowledgement may be, it nevertheless requires additional clarification. This means justifying a specific claim of balance, which, allowing an interdiscursive reference to the status or dignity of *sui juris* – seriously taken not as a self-subsistent hypostasis but as a specific, historically determined, practical-cultural *artefactus* (inseparable from the claims of *audiatur et altera pars*) – avoids however the treatment of narrativity as a pure celebration of incomensurability. This balance demands in fact that the components relating to identity are incorporated in the status of legal subjectivity without crossing the threshold that deprives law and legal discourses (and the practical circle which they constitute) of a plausible claim to (or vocation for) comparability, i.e. without forgetting (or renouncing to) – as it often happens with identity-based theories and critical assimilations of narratology – the specific kind of intersubjectivity which (as one of its constitutive artifacts) distinguishes law as a form of life, a project or a tradition.

We mean evidently a specific way of creating meaning concerning legal subjectivity which conjugates attributive bilaterality (Leon Petrażycki & Miguel Reale) and comparability (Levinas): on the one hand by imposing a reciprocally constitutive connection between spheres of autonomy and responsibility (spheres which are normatively and dogmatically specified as webs of rights and duties) and, on the other hand, by supporting a relevance filter which, considering each subject as a party in a shared situation-event distinguishes concreteness from singularity, i.e. an analogically comparable concreteness from pure, unconditional and absolute singularity (Linhares, 2022, pp. 90–98). This is certainly more than a clarification; it is also a tension-generating challenge. Either way, an indispensable challenge, that we should not forget while attributing to identity features the contextual (juridically relevant) weigh which they deserve.

## Conclusions

Legal recognition means that we are bearers of certain rights and as such, we can demand their fulfilment, but only on condition that we are aware of the normative obligations that we must uphold towards other subjects (Honneth, 1994, p. 174). Recognition thus has a double reference: the norm – the binding legal order, and the other human being, compelling each to identify the other as an individual free and equal to all others. In other words, legal recognition, thus understood, combines the universal validity of the norm and the uniqueness of each person.

From the perspective of the right to identity – especially the possibility to (re) construct it – self-respect enhances the sense that we are fully appreciated, cooperating members of society, capable of guiding ourselves through life with the principles associated with a specific, personal concept of the good worth striving for and realising. It is important for a person to live in a way that ensures the preservation of the inherent value of their dignity, determined by a certain minimum resulting from the fact of being human. The measure of this value is the respect we have for ourselves, for others, and the respect others have for us.

The possession of individual rights means that the subject can assert socially accepted claims and thus engage in legitimate social activity, with the conviction that all other members of society must treat them with respect. Rights, such as the right to identity, the right to privacy, or the right to freedom of expression, and the right to tell the story about one's own life, help in cultivating self-respect and enabling the shaping of personal identity, as they provide each individual with an additional symbolic means of expression, allowing them to demonstrate their social actions externally, and express their reflexiveness, distinctiveness, which should lead to the universal recognition of that individual as a fully appreciated and unique person.

In legal relations, the ability introduced by Heidegger and emphasised by Giddens, namely, to reflexively relate to oneself, allows meaning to be imparted to the action of the reflexive subject, explaining the motives behind certain behaviour, or ultimately analysing the correctness of decisions made (by identifying benefits and losses).

Stories, however, are transmitted through ‘meta-codes’ that have a universal character. Such meta-codes allow specific messages to penetrate the cultural structure in an understandable and empirical way. They enable the subject to relate specific events and behaviour to themselves and other participants in the interaction, interpreting them in terms of familiar or unfamiliar situations. This makes it possible to explain why a particular subject entered into a specific contract, performed a legal act, or refrained from certain actions.

This reflexivity also generates a crucial conviction: that we can independently develop and improve the paths of our own lives, and thereby control the surrounding reality, at least to some extent. The autonomy and dispositionality of our legal decisions reinforce this belief. It is manifested in the legal situation of a subject to whom the law grants the competence to independently shape legal relationships. The autonomy of will means the possibility for legal subjects to establish and shape their legally binding relationships. The ability to act freely and intentionally is possible when one is a conscious and self-aware being. This primarily involves the ability to make conscious experiences the object of one’s own higher-order observations and the ability to conceptually distinguish oneself and one’s own body from all other objects. And the awareness of the person to whom we wish to attribute an action must maintain their identity over time.

It is essential to reemphasise that the continuous explanation of oneself to others is the focus of discourse in a democratic legal state, within which various components of identity are verbalised and negotiated with other participants in social interactions.<sup>7</sup> We can describe identity with various adjectives: personal, cultural, ethnic, national, social, gender, political, civic, or professional. And the life is a journey during which we shape ourselves, arriving at different harbours and ports, and ‘the process of the journey matters equally if not more than the actual arriving (Swayd, 2014, p. 35).

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<sup>7</sup> For example, one particular argument is the cultural defence argument.

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## How to Humanize ‘Feral Children’: Constructing ‘Proper Identities’ in Liberal and Illiberal Legal Discourses

**Abstract:** The subjects of this article are the mechanisms of constructing the identity of the collective subject of sovereignty in liberal and illiberal discourses and the issue of the relationship between collective identity discourses (primarily those related to law and imposed by law) and the political. The author adopts a specific perspective inspired by post-structuralism and post-Marxism. This perspective denies the claim of modern liberalism to be a meta-category in relation to other political and ideological options. The so-called post-politics inscribed in liberal discourses is, from the point of view of post-Marxism, a political proposition deeply entangled in ideology. The basic thesis of the article is that both the liberal and illiberal discourses in the construction of the subject of sovereignty are essentialist and perceive this subject as an imagined community that must be built with the significant participation of the law and (partially hidden) coercion.

**Keywords:** collective identities, constitutionalism, legal discourse, liberalism, post-Marxism

### Introduction

Modern natural sciences have developed the concept of ‘feral children’.<sup>1</sup> This means individuals who, biologically, undoubtedly belong to the species *Homo sapiens*,

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1 In 1920, the people of the Indian district of Midnapore were plunged into fear, terrorized by ‘ghosts’. The mystery was solved by Reverend Joseph Singh, who discovered that the ‘ghosts’ were two little girls living in the forest with a pack of wolves. They ran, like other wolves, on all fours with their noses to the ground. The children were treated by other animals like ordinary wolf pups. Joseph Singh captured the girls; he felt that he was legally and morally obliged to do so because of his membership of humanity. The ‘human wolves’ were given the names Amala and Kamala and placed in an orphanage. The girls did not develop speech, but they did learn how to

but who have not developed cultural competences and do not identify as humans. Without a doubt, the natural sciences are essentialist regarding the criteria for being human: someone who is born human has an inalienable human identity. Even if this identity does not coincide with individual feelings, it is the responsibility of the rest of humanity to restore the proper order of things. Essentialism leads to the construction of identity based on one feature (or a narrow set of interrelated features) and plays a double disciplinary role. Firstly, it disciplines the entity making a judgement regarding a specific identity; secondly, it sets disciplinary rules for an individual whose identity has been essentialistically established. Moreover, although essentialist discourse can become entangled in conflicts and generate coercion and violence, it presents itself as without alternative and apolitical, legitimizing its violent effects with the logic of objectivity and necessity (Calhoun, 1994, p. 9).

Undoubtedly, modernity has linked all normalizing and identity discourses more closely to the law, making the legal order both the most important tool and the strongest guarantor of identity essentialism. Each modern legal order does not allow the cultivation of an individual's own unique identity (even if it says that it does), but at most allows the choice of various options, which it classifies and determines itself.

In this article, I will address the issue of the relationship between collective identity discourses (primarily those related to and imposed by law) and the political. It is not my goal to follow Yascha Mounk's (2023) path and blame identity discourses for the weakening of the liberal projects and universalist programmes of Western modernity. On the contrary, I believe that identity conflicts cannot be eliminated, because they are part of the grammar of the Enlightenment. I will also not focus on discourses defining the categories of humanity and the characteristics of being human. The metaphorical anecdote about Amala and Kamala presented in note 1 may concern more than just species identification. As a philosopher of law and a critical constitutionalist, I will rather refer to the categories most important for constitutional law: the sovereign member of the national community and the law-abiding citizen. My goal is not to criticize liberalism, unless any questioning of its unique

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howl, which was probably understandable to other wolves. During the day, the children hid, and at night they howled at the moon and refused to eat anything except raw meat. It was noticed that they had extremely acute senses of smell and taste. The orphanage employees attempted to socialize the girls, but this turned out to be impossible. Amala and Kamala had deformed joints and ligaments from constantly walking on all fours, which made them unable to assume an upright position. They also turned out to be completely resistant to human diseases. Due to a kidney infection, Amala did not survive even a year in the orphanage; Kamala lived for several years but never identified as human, even though she was about 16 years old at the time of her death. Interestingly, the deaths of Amala and Kamala are commonly perceived and explained not as an individual tragedy of two living beings who somehow coped with the world until they were forced to become human, but as a failure of the socialization process, the reasonableness and validity of which is beyond any doubt. As Reverend Singh lamented, unfortunately the girls were not able to be restored to their 'proper identities' (Singh & Zingg, 1942, p. 2 ff.).

truthfulness and metaphysical pretensions can be considered criticism. I try to approach the compared ideologies with a relatively similar distance.

To make my considerations less abstract, I will refer to the Polish context. My goal will be to show the entanglements of identity discourses that determine the main axis of the political (and legal) conflict in Poland. The first of them can be described as liberal, the second as illiberal; they are in opposition to each other, although at the structural level they are based on similar essentialist, exclusionary and predatory mechanisms of determining 'proper identity'. It is not my task to describe political conflicts or investigate their causes; I also would not like to 'accuse' liberalism of authoritarian practices. Rather, I would like to show that the two oppositional discourses have structurally similar features – they are two heresies within the same religion. The choice of the Polish case is, in my opinion, justified for several reasons: firstly because the Polish transformation of the last thirty years fits the 'feral children' metaphor more than Western examples. As sociological research shows, understanding and support for neoliberal views in Polish society in the late 1980s (especially among the lower classes) was minimal or at best insignificant. However, the reforms took place in an unequivocally neoliberal spirit, resulting in a sharp, painful transformation of the way of life of millions of people. There are many indications that while the need for a revolution was widely felt in Poland, the shape of the new political and economic system was imposed contrary to the imagination and expectations of the majority of society.

Secondly, eight years ago, the illiberal coalition effectively challenged the hegemony of liberalism in political terms by appointing itself a spokesperson for groups whose opinions were not taken into account in the processes of political transformation. The election results showed that 'feral children' do not necessarily have to be socialized in the only right way. The illiberal, populist parliamentary majority began to implement a new concept of rebuilding the 'proper identity' of the sovereign state based on the rejection (apparent in many respects) of neoliberal visions and replacing them with nationalist, conservative and anti-globalization theorems. The new discourse turned out to be similar to the old one, at the structural level. Despite its declared pluralism and heretical character, it became highly essentialist and repeated the postulate of the necessary resocialization of 'feral children', although, of course, it included other social groups in this category.

Currently, however, a liberal coalition has regained power, whose main effort is to restore the impression of the sole rightness of an order whose legitimacy had previously been significantly weakened. The third argument justifying the need to analyse the Polish case is of a more general nature. Taking into account the fact that in many Western countries, the hegemony of democratic liberalism is threatened by illiberal political forces that seem to be growing in strength, the Polish scenario may also be realized in a more or less similar way in the West.

When it comes to the theoretical dimension of the text, I am of course aware that I am not treading in virgin territory. The phenomena I am interested in were theorized by such stars of the philosophical left as Michel Foucault (*assujetissement*) and Louis Althusser (interpellation). Using some of their theoretical tools, and combining them with others, I would like to develop a concept that is as eclectic as it is convincing. Overall, the research perspective adopted for the purposes of this text is deeply inspired by post-Marxism. In the professional discourses of political science and philosophy, post-Marxism is nowadays mainly associated with the theories of Chantal Mouffe and Ernesto Laclau. However, the category of post-Marxism can be treated more broadly, referring to a relativistic position, the tradition of left-wing philosophy inspired by the ideas of Antonio Gramsci that rejected economism, the Frankfurt School and the classics of post-structuralism. The key element of post-Marxist discourse is a reinterpretation of Marxism based on radical social constructivism: if the social world is created by ideological practices, then identifying and delegitimizing these practices can effectively change this world. The rejection of determinism and of the traditional Marxist one-way relationship of determination between the base and superstructure, based on the famous thesis that 'life determines consciousness', leads to the assertion that the 'superstructure' is based not so much on economics as on specific relations of understanding and legitimacy, in which ideological leanings and entanglements in antagonisms and inequalities are not difficult to see (Rekret & Choat, 2016, p. 281). The post-Marxist perspective denies the claim of modern liberalism to be a meta-category in relation to other political and ideological options; the so-called post-politics, inscribed in liberal discourses, is, from the point of view of post-Marxism, a political proposition deeply entangled in ideology.

## **1. Relations between identity and discourse from a post-Marxist perspective**

To put it briefly, Mouffe and Laclau, adopt the Foucauldian assumption that discourses construct both reality and identity. In other words, a given object can only have meaning within a discourse and, on the other hand, the (self)identification of the subject is also linked to discourses. If, following Carl Schmitt, one accepts that, for the political, the opposition of us and them – de facto meaning an identity-based interpretation of the friend/enemy distinction (identity is always constructed negatively, through reference to another) – is crucial, then identity conflict has to be viewed as a struggle between discourses (Mouffe & Laclau, 1985, p. 93 ff.).

In discourse, the political and identification dimensions intertwine and political categories are produced, which are based not so much on the a priori attributes of the individuals involved, but on the mechanism of forcing acceptance based on the rules of discourse. The mechanism is simple: if a given entity recognizes the truth of cer-

tain theses or the meaning of certain words, it becomes a subject of a given type and thus not only must accept the truth of subsequent theses, the meaning of subsequent words and the validity of subsequent postulates, but also should self-define and act in a specific way. At the same time, an entity rooted in discourse should deny the right to define itself to other discourses and reject the meanings of words and the validity of theses promoted by competing identities. In practice, differentiating oneself from others is a priori to self-definition. This is because identities considered hostile are easier to define in the perspective of discourse and seem more stable and clear; it is easier to attribute certain characteristics to the enemy by positioning oneself in opposition to them (Gupta, 2007, pp. 5–6). The pursuit of the stabilization of meanings and identity paradoxically makes it impossible to achieve this goal, as it triggers specific reactions in hostile discourses, which requires subsequent and practically endless redefinitions and rationalizations of what is hostile and what is ours. Participating in discourse gives the individual subjectivity, makes him/her understandable to others and to him/herself, but at the same time subjugates him/her, making him/her dependent on the rules of discourse; Michel Foucault used the term *assujetissement*, which means both 'subjectification' and 'objectification'. At the same time, *assujetissement* determines the conditions for the recognition and understanding of one's own identity by oneself and others, but also limits the possible spectrum of action, as it imposes an insurmountable discursive logic of being oneself. As Foucault wrote:

This form of power applies itself to immediate everyday life which categorizes the individual, marks him by his own individuality, attaches him to his own identity, imposes a law of truth on him which he must recognize and which others have to recognize in him. It is a form of power which makes individuals subjects. There are two meanings of the word 'subject': subject to someone else by control and dependence; and tied to his own identity by a conscience or self-knowledge. Both meanings suggest a form of power which subjugates and makes subject to. (1982, p. 781)

Of course, a specific individual is at a given time a participant, or, as the French philosopher put it, a bundle of discourses. However, there are situations in which a particular discourse gains an advantage over others in defining identity. Louis Althusser noticed this when writing about ideological interpellation; *interpellation* in French means, first of all, speaking loudly and clearly to someone in order to get their attention. In Althusser's approach, interpellation has a different dimension, especially in politics: it forces one to accept a specific identity and makes it unique or primary (Althusser & Montag, 1991, pp. 23–24). For example, when an SS man addresses a passerby with the words 'Du, Jude' and he reacts and interacts, his Jewish identity (in a specific political context) becomes the most important or even the only significant one. Other possible identities – professional, family, class, etc. – lose their

significance. As Rafał Mańko (2014, p. 45) notes, political and legal discourses have a particular tendency to use ideological interpellation and reduce the various identities of a given individual to one leading pattern. Politics as an activity determined by the political (i.e. the primary force that antagonizes individuals and groups) is possible only as a result of the discursive *assujetissement* of individuals. Participating in a discourse causes identification with specific contents of empty signifiers, i.e. axiologically charged terms and theorems that cannot be ultimately filled with content acceptable to everyone (Laclau, 1996, p. 37). As Slavoj Žižek (2008, p. 113) convincingly argues, such signifiers always acquire a retroactive meaning; that is, they are filled with content after a specific identity is established and are treated as if they had this content for a long time.

Law in this perspective is primarily a tool enabling and sanctioning *assujetissement* and at the same time supports the hegemony of the discourse that governs the law. In other words, politics is a struggle of identity, a war of identification. According to Claude Lefort, politics (and especially democratic politics) exists as long as it is possible for collective identities to compete for a temporary occupation of the 'empty place of power' – a space that, with the triumph of modernity, was freed from traditional metaphysics. The triumph of one 'proper identity' means the end of politics, or at least the end of democracy (Lefort & Rosanvallon, 2011, p. 20).

## 2. 'Feral children' and revolutions in Poland

Revolutions in Poland usually created a collective identity for the revolutionary entity only after victory and with the significant encouraging and also repressive participation of the law. In other words, revolutions were brought from outside, and shaping the identity of the domestic subject of the revolution was a long and complicated process. External revolutionary forces encountered a population of 'feral children' in Poland, trapped in false consciousness, who had to be subjected to appropriate processes of healing socialization. This was the case with the proletarian revolution brought on the bayonets of the Red Army and with the liberal revolution imported from the West. It is difficult to deny that the socialist legal and political order was imposed on Poland by force and that the law was highly repressive. It was, in fact, the implementation of Lenin's famous thesis that class consciousness must be brought to the working class and peasants from the outside, using all possible persuasion, including the use of violence against those who resist. As noted by the Marxist sociologist Jacek Tittenbrun, the system that had developed in Poland since the time of Stalinism was based on deep distrust of the peasantry and the proletariat. Professional Marxist politicians were convinced that the 'false consciousness' of the masses, which resulted in, among other things, the failure of the agricultural collectivization project, required 'conversion by force' and monitoring of the gains with legal sanc-

tions (Tittenbrun, 1992, p. 179). The law not only encouraged identification with the new political order, but strongly prohibited any delegitimization of it. Based on Articles 22 and 29 of the so-called Small Penal Code (Decree of 13 June 1946 on Particularly Dangerous Crimes during the Reconstruction of the State), acts related to the dissemination, storage or preparation of information that was 'false' or 'slanderous' of the new system were penalized, which even included telling political jokes. The sanction for this was a stay in a labour camp for up to two years.

The Constitution of the Polish People's Republic of 1952 defined the state as a people's democracy, whose sovereign was 'the working people of towns and villages'. In 1976, the Sejm almost unanimously passed an amendment to the Constitution stating that the Polish United Workers' Party was 'the leading political force of society in building socialism'. During the preparatory work, an amendment regarding the dependence of citizens' rights on the fulfilment of their obligations to the state was deleted from the bill, almost at the last moment. The solutions introduced clearly demonstrate the authorities' concerns about the lack of real identification with the official entity of state sovereignty with the role assigned to it by law. The constitutional discourse of the era emphasized that the Polish People's Republic was a state of permanent revolution, building socialism, so the subject of the state was not so much the real people, but the imagined community. As the Marxist constitutionalist Sylwester Zawadzki wrote, surprisingly honestly, superior authority cannot belong to a community 'with a variable class structure' (1980, p. 112). Therefore, conceptual reconciliation of the concept of 'working people' with the subject of state sovereignty will only be possible after achieving the political ideal and the abolition of classes. This statement was an admission by an authority prominent in the eyes of the party that the main task of the government is to construct the identity of the collective entity of the state and not to determine its real aspirations and interests.

Despite the poor effectiveness of the process of 'building socialism', it is difficult to talk about a complete failure of the socialization project. All mass strikes, including those in the 1980s, broke out around demands for reform of socialism, not its abolition; this was not only due to fear of clashing with official law, but was also the result of arrangements related to the awareness and identity of workers. Nevertheless, the wave of protests in the 1980s was channelled into replacing socialism with a neoliberal version of capitalism. As Marxist philosopher Adam Schaff (1998, p. 19) points out, sociological research showed that in the second half of the 1980s, awareness of the unique correctness of capitalist solutions was negligible among representatives of the peasantry and working class, but dominated among a narrow group of influential elites, both those identifying with the official authorities and those declaring their opposition to them. The legal symbol of the changes is the famous '*lex Wilczek*', the Act of 23 December 1988 on economic activity, adopted with the strong support of party elites in conditions of relative media silence even before the round-table discussions, which were considered the beginning of the political transformation.

The Act introduced a capitalist system in Poland based on supporting citizens' economic activity and the principle of laissez-faire (economic activity was limited only by explicit prohibitions formulated by law, and did not have to implement any social goals or programme norms).

The victims of the revolution were clearly the lower classes of society. Once again, the law became the basic tool for the socialization of 'wild children' because it was presented as a set of tough but necessary solutions that cannot be the subject of rational criticism, even if they 'seem' wrong and produce overt violence and exclusion. A characteristic feature of mainstream legal discourses in the region was the more or less clearly evoked but unambiguous acceptance of the thesis that the imported neo-liberal complex of solutions is not only 'proper', but also must be protected against the 'unreasonable masses'. The approach to the problem of 'constituting power', known in the West, was very realistic, not to say Machiavellian, in the region. As Bogusia Pu-chalska notes, the lower classes in Central and Eastern European countries were perceived as an 'unorganised multitude which must acquire organisational form before they can be allowed to have a say on a new constitutional order under which they are going to live despite successfully coordinating the democratic movement that brought down previous regimes and acting in compliance with the quasi-constitutional rules that developed during decades of political struggle' (2011, p. 14).

Despite the immediate introduction of the principle of national sovereignty in constitutional acts, in the dominant discourses the people were perceived as a source of solutions only in a very metaphorical sense – they were only de iure sovereign, and could only become de facto sovereign by carrying out ideological self-interpellation, i.e. by adapting to the law, as it were, as a priori established. Society was to be gradually accustomed to systemic solutions developed by professionals based on imports from the West. This import was treated not as ideological, but as primarily technological. Just as the masses were not supposed to worry too much about the construction of sewage systems or railways, it was also necessary to 'do your part' when it came to the implementation of neoliberal law. As the conservative American liberal Bruce Ackerman wrote in 1992, in a book that was a collection of advice on the constitutionalization of the liberal revolution in Poland, the key issue is to set a model of citizenship by law based on resourcefulness and care for oneself (first) and for public affairs. This requires, above all, supporting rationality and political restraint in a political and economic system that may prove unsustainable (Ackerman, 1992). If we apply Etienne Balibar's concept of 'the fear of the masses' at this juncture, we can say that the discursive aim is to transform 'the fear that the masses inspire' into 'the fear experienced by the masses' (1994, p. 4). The idea is to subject the lower classes to such indoctrination that they themselves come to believe they are a source of superstitious radicalism that is difficult to control. The basic tool is the aforementioned ideological interpellation; that is, the construction of such obviousness with regard to

the category of subjects and their rights that it becomes an insurmountable element of the self-identification of each individual in the ‘terrible majority’.

Actions to increase the ‘fear of the masses’ were intensified in referendum campaigns concerning such ‘obvious’ issues as the adoption of new constitutions or accession to the European Union. Ackerman’s emphasis on the requirement of rationality is clearly compatible with the concept of ‘rational Poland’ that was once popular in liberal discourse. This evaluative and binarizing metaphor, once disseminated by President Komorowski, refers to a certain imagined political community of objectively reasonable citizens, aware of the real *Raison d’Etat*. This community is the holder of collective knowledge – true, non-contradictory and non-political – which can and should be transposed into the ultimate solutions to specific ideological disputes, complementing the *acquis constitutionnel* and, as it were, abolishing politics.

The solutions resulting from this ‘rationality’ may indeed cause individual and group harm and may not be liked by everyone, but in principle they are simply appropriate and objectively necessary. The threat to ‘rational Poland’ is ‘radical Poland’ – an imagined community of people who are manipulated and do not understand reality properly, sharing the false consciousness of the participants in the political game. These individuals and groups incorrectly interpret their real or imaginary wrongs and, being wrong, take them to be an element of objective injustice, or, worse still, the result of the hegemony of a certain political vision. ‘Radical Poland’ is dangerous because, stuck in Foucauldian *déraison*, it interferes with the rationalization of government and unnecessarily opens political disputes that can, after all, be abolished by the consensual actions of expert bodies in whose hands real power should rest.

Of course, liberal discourse has evolved, and the content of law has changed along with the activities of institutionalized politics. However, the basic assumption of the system was still the construction of a new society of resourceful individuals trusting in the epistemological advantage of juristocratic expert systems.

### **3. ‘Feral children’ and ‘lemmings’: ‘Proper identities’ in illiberal discourse**

In the light of the above remarks, it is not surprising that the main thread of the Polish populist discourse is that of an elite conspiracy – in this story, the alleged revolution of 1989 is the result of collusion between the communist and opposition intelligentsia. These two groups took ownership of the economy (and stole national wealth) by introducing laws that were primarily intended to secure the balance of power. Contrary to the official provisions in the Constitution on national sovereignty and democracy, the legal system and its institutions are, above all, a guarantor of the inviolability of the deal. The courts (so highly regarded by the West) are unfair and prefer a minority ‘post-communist’ ideology and mentality. Illiberal discourses have

made quite an interesting, convincing and surprisingly left-wing redescription of the process of the transformation and socialization of the 'feral children'. In the illiberal perspective, feral children are not only the so-called losers in the transformation, i.e. people who were forced to make heavy sacrifices to forcibly adapt to new conditions, but are also called lemmings – blind believers in the new reality who are unaware that they are heading towards destruction that will also consume them. Lemmings are the main carriers of post-communist mentality and at the same time its victims.

It is true that the adjective 'post-communist' has gained a career primarily as a term for the former countries of the so-called people's democracy and for the political forces that became the formal heirs of communist parties, but in the illiberal discourse it gained a new, 'mental' meaning (Nodia, 2000). Since the neoliberal transformation was part of an agreement, or rather a conspiracy, between former oppressors and foreign plutocrats, there is an obvious personal and ideological connection between Marxism and neoliberalism – all the more so because the political practice at the turn of the two systems preferred people with a specific mentality, cynics and tricksters who wanted to achieve quick success, giving up ideals and betraying the collective identities from which they came. Even though lemmings seem to participate in power, they only act as compradors in the service of internal and external enemies. Lawyers play a significant role among the lemmings, who by supporting the law of the *ancien régime* contribute to the alienation of the healthy part of society. The identity of the revolutionary subject can therefore be built on the rejection of the old law and in opposition to the lemming mentality. Law is again a tool for identity transformation.

Realism in the approach to the legal order means that the political demands of illiberals primarily concern the 'recovery' of the law by gaining control over legal decisions and the entities that actually make these decisions (mainly courts and tribunals). The best tool for implementing socialization plans through law would be a new constitution. Krystyna Pawłowicz – a current judge of the Constitutional Tribunal, a former member of the illiberal Law and Justice party and an academic lawyer – suggested that the adoption of Hungarian models would make it possible to limit the flaws in the Polish Constitution currently in force, which contains provisions that amount to 'an act of national treason committed by the then establishment' (Fronda.pl, 2015). Pawłowicz goes on to explain that 'the Constitution should clearly define the system of values binding on the Polish community, including the issue of Polish Christian identity, moral customs and the protection of life. These issues cannot be the subject of conjecture or free interpretation. [...] Without being aware of this, we will not be able to rebuild our culture and tradition' (Fronda.pl, 2015). According to this vision, constitutionalization should not be based on the beliefs which society actually professes, contingently and temporarily, but rather on 'imponderables', the confession of which is the duty of every true Pole; the nation here is an imaginary community which must first be rebuilt through the arduous process of education.

The element of coercion in this statement, which is hardly concealed, is legitimized by the obvious nature of national duty. The Constitution, Pawłowicz continues, 'should contain provisions that will protect Poland from the various derangements of successive ruling groups that would like to deviate from these values' (Fronda.pl, 2015). In other words, the Constitution is tasked with rebuilding the constitutional identity of the nation and setting it in stone, so that it is immune to the 'whims of democracy'. Of course, the illiberals lacked a majority to implement their plans to 'constitutionalize' the revolution, but they managed to change the content of legislation with unprecedented dynamism. The results of the last elections show that the project of building a collective identity with the significant involvement of law has been partially successful: the illiberal coalition received the most votes, although not enough to maintain power as the opposition united against a common political enemy.

## Conclusions

As I have tried to show, the model of forced reconstruction of identity with the significant involvement of law is structurally linked to revolutionary processes in Poland. The collective identity of the revolutionary subject, or the 'proper' identity of the sovereign state *in statu nascendi*, is constructed in opposition to a specific, discursively constructed group that must be changed through active socialization.

Anthropologist Arjan Appadurai promoted the category of predatory identity in his works; in its self-definition, the predatory identity assumes that in order to survive it must strive to eliminate other identities that it considers hostile. The trait of being predatory is primarily attributed to identities created by totalitarian, nationalist, terrorist and, finally, populist discourses (Appadurai 2006, p. 7). Liberal discourse seems to value all minority identities, because it assumes the need for pluralism and the coexistence of various identity groups based on different interests (group interests are derivative of individual ones). However, from an external perspective, like any ideologized practice, it demands recognition of its vision of the coexistence of specific identities as a meta-category. At the same time, it rejects traditionally understood violence; however, as Isaiah Berlin (2014, p. 201) wrote, , liberalism contaminated by the Ionian fallacy baselessly assumes that all political problems can be understood and, consequently, solved through apolitical and 'pure' epistemologically oriented actions.

As I have tried to show, liberal discourse has also had predatory features in Polish practice. Of course, the intensity of a specific feature and its violent potential are important. However, if we look at the revolutions of recent decades diachronically, the violent potential of liberalism, measured by the number of victims and the intensity of coercion, turned out not to be small at all. However, the 'predatoryness' of illiberal discourse has turned out to be relatively small. Of course, factors independent

of the discourse itself may be responsible for this: the attitude of the opposition, support for liberals provided by the US and the EU or the inability to obtain a constitutional majority and full control over the judicial and administrative apparatus which both socialist and liberal political forces had previously achieved. I am not saying that illiberal discourse is not worse than liberal discourse, but its recent dominance of institutionalized politics has not proven particularly predatory. It must also be taken into account that the illiberal (unfinished) revolution in Poland was the first that was not deeply inspired from outside. Even though the liberal coalition has regained political power, the illiberal discourse will not disappear, and the identities it shapes will remain. Perhaps adopting the post-Marxist assumption that conflicts of discursively constructed identities cannot be avoided and cannot be resolved by meta-rules will prove practically useful in dealing with the inevitable.

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## Narrativity and the Idea of Narrative Identity in Law

**Abstract:** How can an extension of the legal perspective with the idea of narrative unity be presented using the law and literature movement? Considering law as a complex semiotic object that is a product (and carrier) of culture makes it possible to see elements of narrativity from a theoretical and legal perspective. This is a significant phenomenon, especially after the cultural turn in the humanities. This article presents a problematisation of narrativity in legal discourse and the theory of law. As is well known, the theory of narration and the concept of narrativity have been widely used in the humanities, mainly in literary theory. I propose extending the narrative perspective to law by showing what research directions can be observed when using the concept of narration in the ethical and aesthetic dimensions of law. Finally, I discuss the thesis of narrative identity in relation to law. I adopt the perspective of examining law in the light of literary analysis.

**Keywords:** law and literature, literary theory of law, narrative identity, narrativity

### Introduction

The law uses various types of narrative convention, which are shown in several areas in which law is present in social reality: the law's creation, practice, interpretation, and normativity. In the creation of law, there is narrative coding in the content of the legal text and in legal norms indicating certain ways of behaviour addressed to specific subjects. If we view the created law as a construction analogous to the literary category of the 'presented world', we see that legal norms project a certain vision of the world, oriented towards the future – the kind of world that the legislator intends should come into being when the law is observed. A representative category of narration is that of the narrator – the one who conveys the story but also creates it in the

relationship conveyed to the receiver. In law, the narrator can be the lawmaker, 'hidden' in the construction of the legislator. Another property of law analogous to a literary one is interpretation, the purpose of which is to seek the intention of the sender encoded in the content of the legal text. The role of the lawyer who interprets law is that of a 'translator', who translates the meaning from the surface level to the layer of legal norms. Narrativity is also encountered in the practice of the application of law and in legal practice. Narration is used in the dramaturgy of the judicial process during proceedings, i.e. the court hearing, in which procedural roles are assigned to certain participants and the matters to be spoken of are specified, along with stage directions. Elements of the plot describing the course of events, which are the basis for establishing the facts, are also recreated.

Narrativity and literariness are also visible in one of the most important features determining the specificity of law: the validity of norms and the normativity of the law itself. These are based on formally and conventionally established assumptions; that is, they are counterfactual, not real (for example, the notion that the law 'comes into force' is valid in a given place and at a given time). Finally, the philosophy and theory of law reach for narrative structures. We have such 'great images of law' as the construction of human dignity, subjectivity and objectivity, natural rights and legal rights, and personality rights – namely, the moral and cultural axiological foundations of the legal world. In accounts of philosophical and legal concepts, 'great metaphorical characters' appear, such as Judge Hercules, Judge Herbert in the work of Dworkin (1998), or King Rex in the work of Fuller (2004). Scholars and practitioners in the field of law acknowledge that narrative plays a significant role, permeating various aspects of legal theory and practice in diverse ways (Hanne & Weisberg, 2018, p. 1). Therefore, the law benefits from strategies used in literature, such as fiction, the conventionality of the constructed world, the interpretability of the text, counterfactual assumptions, and narration itself; these will be analysed more closely below.

## 1. Narrativity in the theory of literature and theory of law

The theory of narration is inspired by the works of structuralists, mainly French and Russian formalists, and is reflected in the approaches of structural semiotics. The structuralists saw a special kind of semiotic trope in narrative structures, which are used not only in literary texts, but also in other cultural texts. As well as in literary theory, the theory of narration has also been widely used in historical scholarship. It developed as an independent field of research in the second half of the 20th century (Głowiński, 2004, p. 5), but the beginnings of theoretical reflection on this topic are related to Propp's work *Morphology of the folktale*; later, narratology was developed by such authors as Greimas, Todorov, and Barthes. Important moments in the development

of research in this area included the hermeneutic and then the narrativist turn.<sup>1</sup> These breakthroughs triggered a change in the humanities and social sciences related to the shift from a substantive to a dynamic view of the human being: ‘[I]t is about the category of humans, their identity, the subject, the human individual. The change involves moving away from the object or substance-based understanding of humans and replacing it with a view that emphasises the specific temporality of this being’ (Rosner, 2004, p. 7).

Currently, the concept of narration has been widely mediated by other fields in the humanities – philosophy, sociology, psychology – and is also beginning to be explored by the science of law.<sup>2</sup> Contemporary literary scholar Rosner (1999, p. 10) explains the popularity of narrative in fields other than the theory of literature by the fact that the concept of narration usually appears where the question of human identity in postmodern society arises. This is also consistent with the approach taken by French narrativists (Greimas, Bremond, and Todorov). Inspired by the concept of narrative and by generative grammar, they formulated the concept of narrative grammars, which were intended to cover all narrations, be they artistic, fictional, or those that speak of real events. Research on narration developed within literary studies is referred to as narratology (the science of storytelling), while analyses of narration or narrativity outside literary studies are referred to as narrativism (Grajewski, 2003, pp. 165–176).

As a scholarly category, narratives often appear in reference to historical narratives (which Hayden White, among others, has written about). It is then a strategy for explaining historical relationships by creating stories. When organising the categories and concept of narration, I propose distinguishing between the theory of narration (in the sense of narratology), narrativity as a text feature included in the distinguishing features of literariness, and narrativity as a perspective for examining identity; I will discuss these below. In the first sense, one can speak of narration as a way of transmitting knowledge about the world, but also of constructing a vision of the world and creating historical and cultural continuity. The second approach shows that narrativity as a determinant of literariness is a feature of cultural texts, not only literary ones, such as those that are based on a common cultural context. The third approach I propose is narrativity which is examined in the context of creating a subject’s identity. Narrativity and identity, on the other hand, are terms that are used when questions are raised about what type of subject a person is and what fea-

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1 This was the term used by Martin Kreiswirth (1992) to describe the phenomena occurring in the humanities; also see Polkinghorne (1988).

2 Narrative is an inspiring concept in legal theory. See for example Adams (2016); Alleganti (2022); Binder & Weisberg (2000); Brooks (2002); Bruner (2017); Cichocki (2016); Del Mar & Gordon (2013); Dubowska & Dyrda (2018); Gaakeer (2015); Hanne & Weisberg (2018); Olson (2014); Pieniążek (2015); Ralph (2015); Skuczyński (2020); and others.

tures distinguish their autonomous subjective structure, which can be expressed precisely in narrative identity (unity), for example of the person through self-reflection in specific cultural and social conditions. All of these elements are consistent with an approach close to the creators of narrativity, semiotics – in this case the semiotics of law. In the article, I assume that the semiotic-cultural approach is the most appropriate to narrative in law. This issue is also being explored within the field of cultural studies. Brooks (2002, p. 1) writes that the notion of narrative presupposes that there is a recognisable mode of expression or operation that we call narrative, and although it is not necessarily completely independent of the medium of expression, it can nevertheless be abstracted from that medium. In other words, we are talking about some type of narrative structure or process that can be extracted from a particular medium of expression, whether it is the text of a written word, literature, or another medium of communication (Brooks, 2002, p. 1).

## 2. Narratology and the law: ‘In the power of stories’<sup>3</sup>

An inspiring perspective for studying narrative in law is the law and literature movement. In both fields – law and literature – narration can be used as a form of description and explanation of the world; it is a way of creating stories as well as creating temporal representations (Ricoeur, 2012, p. 318 ff.). As Ricoeur, among others, believed, storytelling helps us understand the world and ourselves because it enables us to organise experiences into a coherent whole. Narration as the creation of story structures is a pattern for a scheme for learning about reality. Ralph distinguishes three features of narration: narrative coherence, narrative correspondence, and narrative fidelity. Narrative coherence consists in the fact that the structure of the text includes certain repetitive elements, such as the status of characters, the relations between them, a certain logical sequence in the plot, its internal chronology, etc. (Ralph, 2015, p. 27 ff.). Narrative correspondence is achieved through a representation of a situation that is appropriate to the common experience of the text’s recipient, which fits with what happens in the ordinary course of the world (Ralph, 2015, p. 29). Narrative fidelity, on the other hand, goes beyond the formal features of the structure and links to the context of cultural resources, appealing to the practical judgement, experience, and intuition of the audience (Ralph, 2015, p. 31). A story is a form of narration, consisting of a series of events crafted, chosen, highlighted, or organised to bring to life, clarify, inform, or enlighten (Posner, 2009, p. 424). If we agree with the validity of Ralph’s distinctions, they can be used to analyse a legal text.

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<sup>3</sup> As Ryszard Nycz writes: ‘Within a few years, quite unexpectedly, we found ourselves in the power of stories. We, that is, literary critics and researchers, linguists, and cultural anthropologists’ (2004, pp. 4–8). This tendency is constantly growing, heading towards a synthesis or at least an attempt to integrate interdisciplinary research.

Narrativity, like the creation of plot patterns, is characteristic of literature, and is also sometimes used in many non-literary texts, such as those of law or history: law also uses narration on many levels. The trial itself can be perceived as a narration, which includes individual stages of plot structure – time, place, people, roles – and each stage of the sequence is another fragment of the ‘story’, which is a link to a larger tale. It begins with a description of the case that caused the legal effect, after which the proceedings before the court are initiated, followed by the evidentiary procedure, the interpretation of legal sources, the establishment of the legal basis by the court, and ending with the issuance of a verdict. During the judicial process, narrative imagery is used. When determining the actual state of affairs, the facts are reconstructed: the sequence of past events, the time, place, people, their roles, and past behaviour are recreated and assigned to legal categories. The narration is also included in the constructions of justifications for court decisions, in which the sender reconstructs the sequence of reasoning that leads them to adopt such a decision and not another, their method of interpreting, making argumentative decisions, linking events and facts to norms, etc. Similarly, analysing the behaviour of characters – participants in the process – means analysing narrative unity in the legal sphere.

As demonstrated by Peter Brooks (2005), a narratological approach to the narrative of law influences legal decision-making. The study of narrative elements in the context of the law and literature movement involves using the tools of literary analysis to understand the structure, content, and meaning of legal texts. Within this approach, it is possible to examine literary or narrative threads present in legal acts, contracts, and other legal documents. For example, the analysis of specific legal texts involves the use of literary methods for various categories of literariness. A narrative can concern the elements of a literary work, which can also be seen in law: the elements of the plot in the context of a legal text are an understanding of the main themes and how they develop in different parts of the text. As for the characters, it may be important to identify actors of the legal narrative, such as the parties to the contract or decision-making bodies, and analysing their roles and characteristics. Motifs and symbols refer to recurring themes or signs in a legal text that help to understand the main points. Language and style analysis involves understanding how a legal text is worded and examining sentence structure, terminology used, and other linguistic elements. Literary analysis as a research tool allows us to look at legal texts from a different perspective, enabling the identification of hidden meanings, interpretations, and social influences that affect the shaping of law and lawmaking. It’s like using the tools typically used in literature analysis are employed to uncover deeper layers of meaning and social contexts in a legal text. Elements of the narrative can also be explored using the law and literature trend, where literary threads that

can be used to understand the law or analyse specific legal codes are analysed.<sup>4</sup> Sharing the above opinion, I believe that literary analysis can be a complementary tool for a lawyer, as an enrichment of strictly legal methodologies.

### 3. Narrativity and the law: ‘In the power of literariness’

The perspective of narrativity (in Rosner’s approach) makes it possible to look at law as a semiotic object, just like literature. Literary analysis has features similar to interpretive practices used in law; it enables the study of the ethical nature of law and insights into its humanistic problems. In this approach, there is a visible reference to hermeneutic methods of interpretation and semiotic approaches to law. In recent decades, the theory of law’s interest in issues that have hitherto been confined to the field of literary studies and other humanistic disciplines can be seen as influenced by the development of cultural studies (and earlier, the cultural turn in the humanities). Literary theory and cultural studies increasingly emphasise the ubiquity of narrative in culture (Culler, 1997, p. 90), and the cultural approach has influenced a return to hermeneutic methods of interpretation. Cultural research shows the crisis of this concept and its displacement by the hermeneutics of suspicion. From the perspective of legal theory, this can be presented as an opposition: narrativity versus analyticity.<sup>5</sup>

A hermeneutic reading of a legal text is not only about reproducing the literal meaning, but also about locating it in context: cultural, social, and political. As Wagner and Marusek write,

the value of a semiotic perspective is that the focus on symbols fosters a sense in which they are real. It breaks down the divide between facts and values which leaves symbols in the value category and hence, like ideas, unreal. One can extrapolate from this a contribution to current political realities. Respecting the semiotic means respecting ideas and symbols as part of our reality (2023, p. xxii).

The use of the literary perspective of narrativity shows that the author’s intention can be a conventionally established construct and is not individualised to a single sender. This may be consistent with the concept of interpretation in Ronald Dworkin’s

<sup>4</sup> See e.g. R.H. Weisberg, *Narrative Plot and Legalistic Dimension* (in:) *idem*, *The Failure of the Word. The Protagonist as Lawyer in Modern Fiction*, New Haven 1984, pp.133–159; P. Brooks, *Narrative in and of the Law*, (in:) J. Phelan and P.J. Rabinowitz (eds). *A Companion to Narrative Theory*, Hoboken 2005, pp. 415–426; M. Fludernik, *A Narratology of the Law? Narratives in Legal Discourse*, ‘Critical Analysis of Law and the New Interdisciplinarity’ 2014, vol. 1 no 1, pp. 87–108 and others.

<sup>5</sup> This also allows us to notice a change in perspective in the approach to law in the narrative, analytical, and postanalytical categories. Here, the use of literature could also be fruitful. On the evolution of the analytical philosophy of law after the linguistic turn, see for example Zirk-Sadowski (2020).

philosophy of law, which speaks of ‘chain’-like work in the interpretation of individual judges, who in their judicial practice are like authors writing successive chapters of a novel. As Dworkin says: ‘Now every novelist but the first has the dual responsibilities of interpreting and creating because each must read all that has gone before to establish, in the interpretive sense, what the novel so far created is’ (1982, p. 193). This may also make reference to Fish’s approach, which states that judges are not ‘servants of texts’ but interpreters, readers, co-authors, and critics of cultural narrative, discovering meanings conditioned by the context and justified by the purpose of interpretation (1999, p. 171). It appears that both ways of thinking about legal interpretation are narrative and hermeneutic. I believe that what should be considered a determinant and common point of narrativity in law is its cultural justification; I agree with the view of Cover on the connections between culture and narrative in law. As Cover writes, legal interpretation is never entirely unconstrained; it cannot solely rely on an understanding of the text or language alone. It also goes beyond a straightforward analysis of what the interpreter perceives as a reading of the ‘social text’, encompassing a consideration of all pertinent social information (1986, p. 1617). Legal narratives are intertwined with cultural narratives (Cover, 1983).

Law and literature within narration are brought together by the theme of the interpretability of the text (literary as well as legal). When applying an abstract legal norm to a specific case, the law necessitates engaging in interpretation. This involves utilising narrative analysis methods, including distinguishing between the framework of the narrative, the actual narrative itself, and what is conveyed. It also entails identifying the functions of narrative structures and recognising various types of narrators (Olson, 2014, p. 371). With reference to hermeneutic approaches, narration is treated as a way of interpreting the world, and reading a narrative text requires taking into account the context, meanings, and relationships between different elements of reality. An example is the category of the narrator, one of the key categories in narration (Ball, 2012, p. 18 ff.). In the theory of literature, we see the construction of the narrator in the so-called omniscient narrative; the narrator is the creator and controller of the presented world. It is possible to transfer the category of omniscient narrative to the study of a legal text by posing the question: Is the narrator of the story about law the creator and controller of the presented world, the reality created by this story?

The narrator of the ‘legal story’ is two-dimensional: it is possible to separate the sender-author of the legal text and the sender-creator of the law. There is a distinction between the subject that actually produces the content and the one that is considered to be the sender of that content. The subject that is formally recognised as the sender is identified as the legislator, who does not use a first-person verb, nor do they appear as the sender in the text itself. The actual author is not, as a rule, the centre of interest in the interpretation of a legal text; the legislator is merely the sender who mediates the message. In a literary text, on the other hand, its counterpart may be the

subject formulating the narration, in the case of prose, or the lyrical subject in poetry; therefore this stratification or two-dimensionality of the sender also occurs here. This coincides with narrative approaches in literary theory. The distinction between viewpoint of focus and narrative voice reflects the emergence of a split between two different modes of characterisation (Binder & Weisberg, 2000, p. 214). In the traditional sense, narratives typically regarded thoughts as monologues, resembling a type of persuasive language adhering to the norms of public discourse. In the modern approach, as in M. Bachtin's dialogic conception of narration, there is a proliferation of voices and viewpoints of narrators (Binder & Weisberg, 2000, p. 215). Applying this to the law, it is possible to see a dialogic narrative structure in which the authority of a narrative or authorial voice can be challenged by the interpreter's point of view.

When discussing this topic, one can also notice how narrativity brings law and literature closer together. However, as Jonathan Culler (1997, pp. 26–27) points out, what distinguishes literary texts from other 'narratively organised' texts is that the former were selected appropriately (by publishers, reviewers, and others) before they reached readers, which makes them programmatically worthy of attention. However, a similar feature can also be noticed in legal texts. For the interpreter of a legal text, the primary goal of the message is to assume that the sender's statements assume correct legislative practice and the legislator's rationality. Both in literature and law, this is the result of the inherent features of the text, which are determinants of literature or law. These determinants are the unique nature of the speech act, the conditioning of the context of meaning, and the dependence of text reception on established social and institutional conventions (in literature and law).

As one can see, many inspiring contexts can be used in the study of law from the perspective of the literary theoretical concept of narrative, including, first, emphasising that legal interpretation and legal texts can be viewed from a perspective other than the positivist one. It is a cultural and hermeneutical approach; the narrative allows the study of the law with the tools of theoretical literary analysis, such as plot structures, dialogicity in the relationship between the sender and the recipient of the text, the concept of the narrator, and others.

The narrative approach also has weaknesses and may cause disagreement. One can ask the question (following Brooks): Does the law need a narratology? Analysing the abovementioned positions allows us to identify arguments supporting and questioning the narrative approach to law. On the side of the former will be the representativeness of cultural discursive practices and the continuity of history over time, while on the side of criticism is possible emotion and lack of objectivity. The point of disagreement is the role of narrative in interpretive practice: proponents of using narrative for legal interpretation believe that storytelling can effectively help understand the impact and consequences of law.

On the other hand, critics doubt the wisdom of giving narrative such a central role in interpreting the law, fearing it could lead to subjective and unpredictable

results. Another argument is the dual approach to emotional involvement and lack of objectivity. Using narratives in a lawsuit may pose a problem of ‘relevant emotional processes involved in transforming stories into legal categories’(Bergman Blix and Minissale, p. 261). As Bergman Blix and Minissale note, ‘[t]he legal transformation of everyday stories into law stories pinpoints how gaps can emerge between a common-sense understanding and a legal understanding of a case’ (2022, p. 261). Proponents of narrative interpretations argue that the emotional involvement of trial participants can be beneficial by helping them better understand and accept court decisions. Critics, however, fear that emotional involvement may lead to unfair judicial decisions because emotions can distort objectivity. Another controversial issue is the role of narrative in the context of the objectivity of law. Proponents of narrative interpretations claim that narrative can increase the objectivity of law by considering diverse perspectives and experiences. However, one may be concerned that excessive emphasis on narrative may lead to subjectivity and loss of clarity in applying the law. The debate on legal narratives in legal studies encompasses various opinions and perspectives. Proponents of legal narratives emphasise their benefits, such as better understanding, emotional engagement, credibility building, and improved communication. Meanwhile, critics highlight the risks of distorting facts, emotional manipulation, and neglecting critical legal issues.

Doubts regarding the use of narrative are also known to literary theorists. Is it worth considering whether narrative is a source of knowledge or an illusion (Culler, 1997, p. 93)? Supporters believe that it is a form of knowing the world, while sceptics believe that narrative is one of the figures of speech. There is a clash of arguments here regarding whether narrative structures reflect or distort the image of reality. Regardless of these doubts, I advocate the productivity of applying the category of narrative to the study of law, if it complements the theoretical and legal methods of literary analysis.

#### **4. Narrativity–identity–subjectivity: The subject’s reflection ‘on oneself as another’**

The issue of the relationship between identity and narration has been widely developed in the theory of literature and other disciplines of the humanities. The concepts of narrative identity were formulated by Ricoeur, Taylor, MacIntyre, and Bruner, and are focused on the search for the status of the subject through the reflection that a person undertakes regarding their own identity on the basis of external conditions or internal (individual) insights. For example, Ricoeur understood narrative identity as a necessary connection between the identity of the acting subject and the identity of the ethical and legal subject. Self-reflection, the ability to ‘talk’ about oneself as a subject, is a condition of being a person. Rosner’s approach in this

context is interesting, as she sees the subject's narrative as self-determining Heidegger's concept of understanding oneself through *Dasein*, the structure of understanding and its temporal (narrative) nature (Rosner, 1999, p. 12). Narrative identity in philosophical terms raises questions about the status of the subject, questions about who or what a human being is (Rosner, 1999, p. 10).

In contemporary philosophy, there is talk of a crisis of the subject, or a philosophy of the subject 'without a subject'. The answer to this crisis is found in the conception of 'hermeneutics of the self', formulated by Ricoeur, who writes: 'The true nature of narrative identity is revealed [...] only in the dialectic of being yourself and being the same. In this sense, the latter constitutes the main contribution of narrative theory to the establishment of "the-one-who-is-himself"' (2003, p. 233). The concept of narrative identity is based on the assumption that human identity is not fixed and unambiguous but can change through the construction of a narration. These narrations can be both individual and supra-individual, conditioned by values and goals shared in society and culture. Let us emphasise that for Ricoeur, cultural codes and contexts are important in identity formation. Narrative identity shows that a person's identity as a subject – social, moral, physical, spiritual, legal, etc. – is not a fixed and unchanging characteristic but a dynamic concept. It shapes and changes through the construction of meanings from our experiences and under the influence of various factors. Understanding narrative as the experience of learning about oneself by telling one's own stories about oneself is the basis of the notion of *homo narrans*, which defines the formula of humans as 'storytellers', narrative thinkers. As Culler says: 'Stories, the argument goes, are the primary way we make sense of things, whether in thinking of our lives as a progression leading somewhere or in telling ourselves what is happening in the world' (1997, p. 90).

Narration and narrative identity inspire new attempts to define human status. The narrative turn mentioned earlier has changed the perspective on how individuals construct their life narrations and identify with them. In philosophy, there has been a change in the understanding of human subjectivity, which is defined as a transition from a substantive to a dynamic approach. The 'substantive' approach means that a person perceives themselves as a static 'substance' or a set of characteristics that define their individual identity. Identity is created due to external conditions, such as social role, profession, features assigned to a given personality type, etc. In the 'dynamic' approach, an individual's identity is created under the influence of changes occurring in the human beings themselves, who shape it through new experiences, learning, and reflection, in a changing historical context.

The connection between narrative and identity has long been a literary interest. In many narrative works, we find examples of patterns of identity formation by characters. The literature also raises questions about whether human identity is given or created and whether one's difference or authenticity can define identity. The significant increase in discussions in literary theory on race, gender, and sexuality is largely

because literature offers extensive material that complicates political and sociological explanations of how these factors shape identity (Culler, 1997, p. 110). Wojciechowski writes very interestingly on this topic in his work entitled *Tożsamość narracyjna jako warunek autentycznej podmiotowości prawnej* (2023a).

Narration understood as a source of human construction and identity and a way of explaining the world is also present in law, as well as, for example, in legal psychology and ethics.<sup>6</sup> The way people define their identity is shaped by stories mediated by symbols, signs, and norms of behaviour referred to by law. Narrativity in the sphere of the practice of law was discussed above; it is also visible in the concept of the subject of law and legal subjectivity, defining the status of a human being as a subject of law. As Dworkin wrote in *Law's Empire*, we live within the law, and thanks to it, it determines what we are (2006). Both law and literature shape the identity of social subjects. The axiology on which the legal system is based is also a set of moral norms considered fundamental in a given culture and society. Ideas, values, and norms in law can form the basis for a shared identity. As Wojciechowski writes, ‘identity is inscribed in the wider social structure, but also by various narrative patterns or cultural scenarios, without which a person would not be able to say who they are’ (2023c).

Narrative identity also encompasses the cultural conditions in which man live as a social unit and as subjects of law. An important determinant is the unity of the narrative form; the core of self-identification in social interactions lies in the cohesive integration of narrative forms.<sup>7</sup> The introduction of a narrative perspective allows us to look at law as an element constructing a story about social identity. The law introduces criteria for categorising persons and other subjects as addressees of legal orders and prohibitions. Nowadays, subjectivity is extended to beings other than humans, such as animals, robots, and AI. The practice and science of law use the concept of legal subjectivity, which is determined by the fact that a subject is one who may be entitled or obliged to do something. This is close to the concept of the identity of a subject as defined by legal norms, indicating who a person is from the point of view of the law at a given stage of life, age, profession, function, etc., what obligations and rights they have, what their legally regulated behaviours are, what they are allowed to do, and what is prohibited. Identity in law is the legal recognition of an individual as a specific person or subject with legal rights and obligations. In literature, on the other hand, we encounter images of society and human experience, which, as in law, belong to the common area of culture. Various literary genres can provide knowledge about different aspects of human life, including the problem of identity. Literature can provide insight into varied aspects of life and thus help in understanding the legal and social context. The problem of identity is a very important and often discussed topic in literature. Who are humans and what are their duties? These are questions that literature

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6 See for example Brockmeier & Carbaugh (2001); McAdams (2001); Rosner (2003).

7 For more on this topic, see Wojciechowski (2023b).

has been posing since the earliest times. Literature is where one can see how human beings are rooted in culture, history, and ethics. This is the case from the perspective of the participant-recipient, but also of the creator of the literary work. In Polish literature, we find such themes in texts such as *Czuły narrator* (*The Tender Narrator*) by O. Tokarczuk and books by J. Dukaj, S. Lem, and others. They are also typical motifs in cyberpunk and science fiction literature; particularly in science fiction, one can notice convergences between literature and law in relation to the problem of identity. The example of the identity of artificial intelligence in literary works shows the philosophical, ethical, and social implications of technological development. The view of law as a humanistic semiotic object, explained above, helps to define human subjectivity and separate it from artificial beings. Evaluation of a situation or the nature of a human being can be distorted by overconfidence in perception or experience. What is important in reality is not what is visible through the senses, but emotions, empathy, memory, morality. Difficulties in distinguishing truth from fiction, reality from virtuality, or human from non-human can be balanced by narrative identity.

## Conclusion

Expanding the legal perspective to include the idea of narration and narrative identity can introduce inspiring aspects to the study of law. The categorisations presented in this article are a preliminary diagnosis and may be a starting point for more detailed analyses in the future. As the above analysis shows, law, like other cultural products, is a narrative, and this narrativity is a tool for creating identity. As shown in the text, the legal perspective, combined with the idea of narrative unity, can be a pretext for analysing several problems, at least: law as narration (creating stories), the interpretation of law as a hermeneutic act of creating meaning (reading the law), and law as the semiotic basis of the subject's identity (building cultural identity through law). Law understood in this way is a sequence of narrations of the creation and application of law, which are conceptualised and interpreted by various legal characters. Introducing the idea of narrative unity into the analysis of law can broaden the legal perspective. I believe that the perspective of narrative unity makes it possible to understand how culture and social values influence the content and development of law. After the cultural turn, law is perceived as rooted in narrative and intertwined with culture; this implies the advantages of adopting an approach to legal discourse that is informed by a deep understanding of narrative structures and techniques (Olson, 2014, p. 371). It is fair to agree with Binder and Weisberg (2000, p. 209) that the task of a narrative approach is not to introduce the narrative subject into the alien and alienated discourse of the law, but to read, critique, and revise the field of narrative discourse that law already is.

Both law and other cultural products (literature, film, visual arts, etc.) are part of the system of cultural and communication codes of a given community that refer to a set of moral values carried by linguistic structures. This makes law a specific semi-otic object, part of a common, broader social narrative, responsive to changing values and norms, and it means that it is clearly legitimate to examine it from the perspective of both semiotics and literary studies.

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## Grundnorm and Grounding A modern Metaphysics for Hans Kelsen's Pure Theory<sup>1</sup>

**Abstract:** This article explores the possibility of reconstructing Hans Kelsen's neo-Kantian theory of the basic norm (Grundnorm) with the help of the theory of (metaphysical) grounding. First, we outline Kelsen's theory of the basic norm as an integral part of his neo-Kantian transcendental idealism and give a sketch of grounding theory; we then try to fit these theories together. As it turns out, grounding theory has some internal flaws. More importantly, several of the features of a metaphysical ground are not compatible with the roles which Kelsen ascribes to the basic norm – its roles as a keystone of the legal hierarchy and as a transcendental-logical condition of legal cognition. Finally, an alternative conception is examined, according to which the legal system is grounded not by the basic norm but by social facts, with the basic norm serving as a bridging principle. However, this alternative is flawed as well; its main problem seems to be that it violates the dualism of 'Is' and 'Ought'. The argument is relevant for the concept of personhood, because Kelsen treats the term 'person' in law as a mere expression for the unity of a specific set of legal norms, so that the identity of persons is ultimately dependent on the identity and function of the basic norm of the legal system.

**Keywords:** basic norm, grounding, Hans Kelsen, legal personhood

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## Introduction

This text is an attempt to reconstruct Hans Kelsen's neo-Kantian theory of the basic norm as it was developed in his writings between 1920 and 1934, by means of current conceptions of metaphysical grounding. There are a number of reasons for this thematic choice. First, the theory of the basic norm is, in spite of its prominence, notoriously unclear. Second, theories of metaphysical relations, and especially grounding, are in vogue in present general philosophical discourse. Third, Kelsen's specific neo-Kantian conception of legal knowledge is the only elaborate (and arguably the only feasible) philosophical background theory he ever presented. Fourth, parts of neo-Kantianism and parts of grounding theory share the aim of replacing traditional ontology, which concentrates on 'what there is', by a theory of fundamental relations. Fifth, Kelsen employs terminology which comes close to grounding vocabulary: he maintains that a *Grundnorm* ('Grund') may be translated both as 'ground' and as 'reason') is at the base (or apex) of the legal system and that, in the legal hierarchy, a higher norm is the 'ground' or 'reason' of the validity of a lower norm. But he never defines the notion of a ground.

The intention is not to give a thorough analysis or critique of either grounding theory or Kelsen's neo-Kantian theory of the basic norm; the aim is rather to examine whether it is possible, on the basis of a broad-brush rendering of both theories, to rationally reconstruct relations which are underdetermined in Kelsen's texts as grounding relations, in order to enhance the coherence of the Pure Theory of law.

At first sight, our undertaking seems to be of little relevance for the topic of this volume, as it does not cover the concept of a 'person' or the question of how the identity of a person is established. However, due to a peculiarity of Kelsen's theory, it is exactly to the point. In the 1920s, Kelsen discussed the concept of a person from a juristic point of view extensively (see especially 1925, pp. 62–76). His argument is among the most complicated and outlandish parts of his theory. He holds that the notion of a person does not belong to those elements which are necessary in constructing the law. Law is made up of 'primary' norms which connect, via the normative category of peripheral imputation, a legal condition – some human action and other circumstances – with the exertion of coercion (we will say more about this below). All elements which are necessarily involved in constituting primary norms, or which are presupposed by them, are indispensable in the construction of the law. The concepts of person, duty and right do not number among these elements. The term 'duty' designates a 'secondary' norm commanding the avoidance of behaviour which normatively triggers a sanction. The term 'right' roughly designates the legal capability to contribute to the circumstances under which somebody else's action or omission normatively triggers a sanction. Both duties and rights are not essential elements of law; they merely facilitate legal cognition or construction and accommodate everyday legal talk.

In Kelsen's view, a person is, from the legal perspective, not the 'bearer' of duties and rights; rather, the term 'person' merely denotes a set or 'cluster' (*Bündel*) of such duties and rights, no matter whether the person is a 'natural' or a 'legal' person. The natural person is the set of those duties and rights that have the acts of one human being as their content; the legal person is the set of duties and rights that have the acts of several human beings as their content. The person of the state, finally, is identical with the (centralized) legal order as a whole. So the concept 'person' is, for Kelsen, an auxiliary construct of a 'second order', as it were. It is an anthropomorphic hypostatization of the unity of a set of secondary norms, which are themselves only protheses of legal thought.

This strange conception is the outcome of rather diverse considerations. First, Kelsen opposes the distinction between law in a subjective and an objective sense. There can be just one homogeneous manifestation of law: objective law. But the notions of person, right and duty smack of subjectivity. So, to preserve the unity of law, they must be reducible to the objective law. Second, Kelsen is an anti-psychologist, and the term 'duty' (as an 'Ought' directed at some empirical human being) has, for him, psychologistic connotations. Third, the unity of law demands uniformity. Besides the primary norm, which merely connects two states of affairs or acts in a normative way, there must be no other essential normative units in law. Fourth, Kelsen is influenced by the neo-Kantian trend to replace concepts of objects (*Gegenstandsgriffe*) by predicative, relational or functional terms (that is, he adheres to the project of detecting hypostatizations and doing away with them). And the term 'person' is a problematic object term.<sup>2</sup>

This is not the place to deal with Kelsen's argument, which is fraught with difficulties. What is important is the consequence that as any person can, in law, be reduced either to the legal order as a whole (in the case of the person of the state) or to subsets of the legal order (in the case of the natural or the legal person), the identity of persons depends on the identity of the legal order, and the identity of the legal order depends on the basic norm. So the relation of the basic norm to the legal order, or whether and how the basic norm 'grounds' the legal order, is what in the end determines the identity of persons from the legal perspective.

We will proceed as follows: first, the basic idea of grounding theory, the main features of the grounding relation and problems connected with them will be outlined. Next, the characteristics of Kelsen's neo-Kantianism and the two main aspects of the

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2 In nuce, these motives can be found in a pointed programmatic passage of his *Allgemeine Staatslehre*, where Kelsen describes the aims of the Pure Theory as follows: 'Dualism of Is and Ought; replacement of metaphysical postulates and hypostases by transcendental categories as the conditions of experience; transformation of absolute, qualitative and transsystematic contrasts within one and the same discipline into relative, quantitative, intrasystematic differences; advancement from the subjectivistic sphere of psychologism into the area of logical-objective validity' (Kelsen, 1925).

basic norm will be depicted, namely, its status as part of the legal hierarchy and its status as a transcendental-logical condition of legal cognition. There follows an attempt to reconstruct the basic norm in terms of grounding theory. Finally, an alternative reconstruction of the basic norm as a ‘bridging principle’ constituting a grounding relation between natural facts and legal norms will be examined.

## 1. Grounding

Grounding theory is a very recent branch of philosophy; it is expressive of a post-analytical and post-modal move ‘back to metaphysics’ (Chalmers, 2018, pp. 1–2). Grounding debate is still very much a construction site, and many points are controversial. There seems to be unanimity concerning some points: grounding is a fundamental relation of determination which captures the meaning of the connective ‘in (or by) virtue of’ and has the capacity to replace traditional ontology. It is not an empirical relation and allows for finer-grained differentiations than analytical or modal relations, and it is connected with the concept of ‘explanation’: if something is a ground for something else, it explains it.

Some standard examples for sentences purported to describe grounding relations are (Correia & Schnieder, 2012, p. 1):

1. Mental facts obtain because of neurophysiological facts.
2. Legal facts are grounded in non-legal, e.g. social, facts.
3. Normative facts are based in natural facts.
4. A set of things is less fundamental than its members.

In the literature, four formal properties of grounding, which are responsible for its ‘directedness’, are more or less uncontroversial: (1) it is asymmetric (if  $a$  grounds  $b$ ,  $b$  does not ground  $a$ ); (2) it is irreflexive ( $a$  does not ground  $a$ ); (3) it is transitive (if  $a$  grounds  $b$  and  $b$  grounds  $c$ , then  $a$  grounds  $c$ ); (4) it is non-monotonic (it is not the case that if  $a$  grounds  $b$ ,  $a$  and any arbitrary fact  $c$  ground  $b$ ) (see Bliss & Trogdon, 2021).<sup>3</sup> Non-monotonicity, however, seems to play a minor role, and irreflexivity seems to be a superfluous feature, because it is entailed by asymmetry.

Then there are two related features which are slightly more specific and more controversial, although they still seem to be mainstream grounding:

1. Grounding is a relation between existing elements; this is the demand of *facticity*. It delimits the relation of grounding from the hypothetical relation expressed by general laws (see Fine, 2012, pp. 37–80).

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<sup>3</sup> In fact, counterexamples to practically all of these properties have been brought forward in grounding literature; still, they are named as features by the mainstream of grounding theory.

2. The ground and the grounded element must exist at the same time. This is the demand of *synchronicity* which is especially used to delimit (metaphysical) grounding from causal relations (Bernstein, 2016, pp. 21–38).

Finally, there are two features of grounding which on the one hand seem to concern the *differentia specifca*, and thus the very core, of grounding, while, on the other, they seem to lead to a paradox:

1. The ground has metaphysical or ontological priority over the grounded element (Correia & Schnieder, 2012, pp. 24–25). It is more fundamental; that is, while it is in some way possible to conceive of the ground without the grounded element, it is (arguably) not conceivable that the grounded element is given without the ground.<sup>4</sup> E.g. we can think of the members of a set independently of the set, but we cannot think of the set without its members.
2. Besides this, a full ground (completely) determines the ‘that’ and ‘how’ of the grounded element – in fact, this seems to be necessary for grounding to have an explanatory function (Glazier, 2020; Skiles, 2020). This dependency relation is neither a causal one nor an analytical or conceptual one – which is what makes grounding ‘metaphysical’.

These features seem to lead to a paradox, because if a (full) ground completely determines the grounded element, then it must be possible to infer the grounded element directly from the ground. That seems to contradict the feature that it must be conceivable that the ground exists without the grounded element. Besides, there regularly seems to be some meaning surplus in the grounded element (see the example given above), which would speak against the relation being one of ‘full’ determination.

This problem might partly be overcome by recurring to the relatively unproblematic notion of ‘hyperintensionality’ (Correia & Schnieder, 2012, p. 14): Roughly, hyperintensionality is given if two expressions have the same extension in all possible worlds, while they still may not be exchanged for each other in every context *salva veritate*.<sup>5</sup> It is a relatively unproblematic notion, because there are obvious examples for it; an uncontroversial one is the relation between the properties of ‘being an equilateral triangle’ and ‘being an equiangular triangle’ – it is neither an empirical nor an analytical relation, but the one can be inferred from the other, while conceiving of an equilateral triangle is still possible without conceiving of its equiangularity (and vice versa). One can know that a triangle is equilateral without knowing that it is equian-

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4 There might be, for example the fact that Socrates was a philosopher seems to ground the fact that there was a philosopher. But the existence of the latter fact does not presuppose that Socrates was a philosopher.

5 In fact, the notion of hyperintensionality has had quite a career recently and has earned its own entry in the Stanford encyclopedia of philosophy.

gular. In the same way, it may be possible that the grounded element is inferred from the ground, while it is still possible to conceive of the ground without the grounded element. (This does not, of course, solve the puzzle of what the ‘metaphysical priority’ of the ground amounts to. See section 4.3 for discussion of this problem.)

Finally, there are several contested features of grounding. The four most important open questions seem to be:

1. Is grounding really a primitive relation, or is the term just a name for a subclass of other well-defined relations or phenomena – for example, a subclass of supervenience relations or a subclass of deductive relations (Audi, 2012)?
2. Is grounding a unitarian concept, that is, does the concept cover just one specific phenomenon, or is it a ‘portmanteau’ concept, covering very different phenomena? Famously, Arthur Schopenhauer (1903) held the principle of sufficient reason to rest on a ‘fourfold root’.
3. What elements are connected by the grounding relation? Some grounding theorists seem to think that these elements are part of a realist world which is structured in levels of different fundamentality; at the opposite end of the spectrum, more reticent authors seem to think that grounding is rather a relation between propositions (Audi, 2012, p. 108; Chalmers, 2018; Schaffer, 2012, pp. 123–124).
4. As humans are not endowed with a specific metaphysical sense, and as grounding seems not to be reducible to any empirical or analytical features, how can one ‘detect’ a grounding relation? Hardcore metaphysicians might assume that grounding relations are self-evident, but one might also hold that the grounding relation has to be grounded itself (cf. Wallner, 2018); then again, one might assume that ‘bridging principles’ are needed to establish or recognize the relation (but this seems to lead to further problems; see the discussion in section 4.3).

## 2. Kelsen’s Neo-Kantianism

Kelsen’s theory is often said to belong to the neo-Kantian tradition, ‘neo-Kantianism’ meaning the specific philosophical movement which dominated German philosophy between approximately 1870 and 1920.<sup>6</sup> Its orientation is expressed by two notorious slogans: *Zurück zu Kant* (‘Back to Kant’),<sup>7</sup> and *Kant verstehen heißt über ihn hinausgehen* (‘To understand Kant is to go beyond him’) (Windelband, 1907, p. iv). On the one hand, philosophy – which, around 1850, was fragmented and in

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<sup>6</sup> This section is mainly taken from Heidemann, 2022, pp. 14–19, 31–38.

<sup>7</sup> Otto Liebmann ended each chapter of his influential book (1865) with some version of this slogan.

danger of being usurped by the successful natural sciences – had to be salvaged by going back to Kant's philosophy. On the other hand, Kant's philosophy was taken to be partly inconsistent and in need of being complemented and improved to do justice to its spirit.

Neo-Kantians tend to neglect Kant's practical philosophy; they are suspicious of his conception of the 'transcendental unity of apperception' as an indubitable starting point; and they are anti-realists – more than Kant himself was. For them, the objective world is not given independently of cognition – rather, it is 'constituted' by it – and they do without assigning any function to the notion of a thing-in-itself. Epistemology rather than ontology is at the centre of most neo-Kantian philosophies.

There are two main schools of neo-Kantianism: the Marburg and the Baden schools. The Marburg school, represented foremost by Hermann Cohen and Paul Natorp, holds transcendental philosophy in a Kantian vein to be a theory of the exact sciences. It accepts the judgements of the culturally established and successfully operating natural sciences as a 'given' fact and critically explores the conditions of their possibility. This brand of neo-Kantianism is of great importance for the further development of philosophy, influencing logical positivism and analytical philosophy. The Baden school, on the other hand, represented mainly by Wilhelm Windelband and Heinrich Rickert, dissolves philosophy into a theory of values. It focusses on the dualism of 'Is' and 'Ought', making use of it to distinguish between the 'genesis' and the 'validity' of cognition; for them, both theoretical and practical cognition gain their objectivity by complying with norms which are derived from universal 'values'. These basic values are truth and goodness. They do not exist like objects exist; rather, they are 'valid', preceding any ontology. From such values, norms emanate which make it possible to distinguish correct from incorrect thinking.

Kelsen's neo-Kantianism combines traits of both schools. He shares the thesis that it is impossible to have cognition of objects if these objects are independent of cognition; he summarizes the Kantian position, approvingly, as follows:

It is impossible for cognition to play just a passive part in relation to its objects; it cannot be restricted to reflect things somehow existing 'in themselves', i.e. in a transcendent sphere. As soon as we can no longer assume objects to have a transcendent, i.e. knowledge-independent, existence, cognition has to play an active, creative part in relation to these objects. It is cognition itself which creates its objects from the material given to it by the senses according to its immanent laws. Cognition being guided by rules guarantees the objective validity of its result. [...] What takes the place of metaphysical speculation is the task of determining the rules guiding the process of cognition, i.e. the objective conditions of this process. (Kelsen, 1928, p. 62)

Focussing on this normative element of cognition – the rules guiding cognition – is, together with the emphasis on the dualism of Is and Ought, part of the Baden school inheritance in Kelsen's theory. The Marburg school is represented by Kelsen's thesis that the valid cognitive judgements which are the object of the transcendental analysis should be extracted from the established sciences:

Referring to the fact of science is the essential of transcendental philosophy, its only basis from which it – as a theory of scientific experience – performs its analyses of its only possible object, the synthetic judgement of experience as science. (Kelsen, 1922b, p. 128)

It follows that scientific judgement is 'the cornerstone of transcendental philosophy, which, therefore, can only be critique of science, critique of cognition, because it is restricted to analysing the synthetic judgement' (Kelsen, 1922b, p. 128). Kelsen concludes that

the law of legal science is a system of *Rechtssätze*, a system of judgements, just as nature as the object of natural science is, for transcendental philosophy, a system of judgements. (Kelsen, 1923, vi)

For him, law, as a set of legal norms, is a system of hypothetical normative judgments embodied in the institutional practice of legal science which connect a certain state of affairs with a sanction by the category of the peripheral imputation (the legal Ought) (Kelsen, 1922a, p. 75). It is the task of the Pure Theory, as a transcendental philosophy of law, to carve out the necessary elements and structure of these judgments and to determine their presuppositions.

### 3. The basic norm

The basic norm was introduced into Kelsen's texts in the 1920s, together with this explicit neo-Kantian background theory and the theory of the legal hierarchy, and it plays a crucial role in both of them.<sup>8</sup>

#### 3.1. The basic norm as the apex norm of the legal hierarchy

On the one hand, the basic norm is a necessary part of the legal hierarchy. In his first texts, Kelsen had tabooed the question as to why a legal norm is valid (Kelsen, 1911, 353), while maintaining at the same time that there are in principle endless chains of deriving an Is, via causal laws, from another Is, and of deriving an Ought from another Ought. But he did not elaborate on this, and he did not explain how

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<sup>8</sup> The section about Kelsen's conception of the legal hierarchy and the status of the basic norm is mainly taken from Heidemann (2022, pp. 43–48).

an Ought might be derived from another Ought. This explanation seems, for the legal sphere, to be achieved by the theory of the *Stufenbau* which Kelsen adopted from Merkl around 1920 (Kelsen, 1923, p. xv).

The theory of the legal hierarchy is well known and is in fact one of the most famous conceptions of the Pure Theory. It need not be discussed in detail in this context; the interesting point for present purposes is that it more or less boils down to the thesis that any legal norm, in order to be valid, must conform to the criteria for its creation laid down in another norm of a higher logical order. At first sight, this seems clear enough; at second sight, however, things are a bit more complicated. There are two different versions of the relation between the higher – and lower-order norms; the first is prominent in specific neo-Kantian writings. As a system of cognitive normative judgements, law is created by legal science, using 'higher' norms as schemes to bestow the mode of Ought or validity onto some alogical material which is 'given' in the guise of, or as the content of, certain empirical acts of some norm-positing organ:

I have claimed that questioning the specific validity of any individual legal norm leads us, step by step, to higher and higher legal norms [...], while the question concerning the content of the legal norm [...] leads us to the acts of legislation, adjudication, etc., which are the 'material' of the legal norms. This distinction is analogous to the distinction made in transcendental philosophy between concept and sensation, between the logical *form* and the perceptual *material*. I have distinguished between the content, meaning the material still to be formed, and validity, meaning the form of the material when construed into a valid logical judgement. The logical creation of the law (meaning, of course, the law of legal science, the *Rechtssätze*) from the basic norm proceeds step by step and under constant reference to a parallel fact (Kelsen, 1922b, pp. 214–215).

While having a Kantian hue, this is metaphorical and vague, and it is difficult to reconstruct it in terms of logical relations. However, there is a second version of the relation between a higher and a lower norm:

A norm is a valid legal norm only if it has been realized in a certain way, created according to a specific rule, posited according to a certain method. [...] As a result of the dynamic character of law, a norm is valid because and as far as it has been created in a way determined by another norm; therefore, the latter is the ground of the validity of the former (Kelsen, 1934, pp. 64, 74).

According to this version, the higher norm (necessarily) regulates the 'creation' and (possibly) the content of the lower norm. What does this mean? In the neo-Kantian phase, Kelsen takes the legal norm to be a logical Ought judgement, and one obviously cannot create a valid logical judgement in the same way one might create, say, a painting or a cake. Still, 'creating' a valid Ought judgement can be achieved

by fulfilling the conditions for the judgement to be valid, or for the corresponding normative sentence to be true, which amounts to the same. After all, in a Fregean or neo-Kantian spirit, a true judgement in a logical sense is the same as a fact, and nothing speaks against saying that one can create or bring about facts.<sup>9</sup> In this case, the higher norm is logically a higher-order or meta-level judgement providing criteria for some lower-order judgement to be valid or to be a fact. Simplified, it has a form somewhat like:

If there is a performative/utterance ‘*Op*’ under certain conditions and with a certain content, then *Op* is a valid norm.

The circumstances of the performative and the limitations to its content would be the conditions for the (lower) norm to be valid. The legal *Stufenbau* would be a logical hierarchy of higher-order and lower-order levels, or object and meta-levels, with the higher-level norms defining criteria for norms of the lower level to be valid.

In this structure, the basic norm stands at the end of the chain of validation. As the highest norm, it answers the question as to why the constitution of a legal order (or rather, the historically first constitution, from which the validity of the current constitution can be derived) is valid. One possible answer to this question might, at first sight, be to say that its validity is simply presupposed by legal science. For legal science as an existing socio-cultural practice, law seems to be ‘always there’, and as no jurist questions the validity of the constitution (or the historically first constitution that validates it), its validity is presupposed. This is, however, not the way Kelsen proceeds. He holds that legal cognition, once justifying the validity of a norm comes to an end for lack of another higher positive criterion for valid norms, presupposes a norm according to which the content of a performative, be it custom or the intentional act of some body exerting factual power, counts as the highest legal norm, that is, as constitution (Kelsen, 1934, pp. 65–66). While Kelsen seldom explains the necessity of the basic norm in detail, there are several reasons why it is not just a ‘needless reduplication’. First, law is, according to Kelsen, only positive law; that is, any legal norm must get its content from a factual act which is in accordance with a ‘higher’ norm. It follows that the constitution would only be positive law if it ‘rests’ on a performative which fulfils the condition for being norm-triggering named in a yet-higher norm; this higher norm cannot itself be a positive legal norm but can only be presupposed as a basic norm. Second, the institutionalized scientific practice that legal cognition is embedded in only takes the constitution to be valid if it adheres to a legal system which is effective and regularly applied in a way that takes the constitution to contain the highest criteria of legal validity. So the basic norm is necessary

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9 ‘Was ist eine Tatsache? Eine Tatsache ist ein Gedanke, der wahr ist’ (What is a fact? A fact is a thought which is true) (Frege, 1986, p. 33).

to capture the legal system being conditioned by its efficacy; sometimes Kelsen even seems to identify it with the principle of efficacy.<sup>10</sup> Third, the ‘positive’ constitution as such often consists of disparate regulations, posited both by those who had the power to do so and by custom. To unify these highest norms of positive law, it is necessary to presuppose a single norm which declares the factual acts by which these highest norms were posited to be the highest criteria for legal validity, thus unifying them (Kelsen, 1934, pp. 62–66).

### 3.2. The basic norm as a transcendental-logical condition

The basic norm’s comparatively tangible position in the legal hierarchy is, however, just one aspect of it. Kelsen also holds that it is a (or the) ‘transcendental-logical condition’ for legal cognition, and thus for law (this is mainly responsible for the vast literature concerning the basic norm), or that it is a ‘hypothesis’ in the sense of Cohen, that is, a fundamental constitutive element (*Grundlegung*) posited by cognition. This is argued for by Kelsen in the following well-known passage:

By formulating the basic norm, the Pure Theory does not want to inaugurate a new scientific method for jurisprudence. It just aims to bring to awareness what all jurists do – mostly without being aware of it, when, in conceiving their object, they decline to resort to natural law from which the validity of the positive legal order might be derived, but still conceive this positive law as a valid order, [...] that is, as norm. With the doctrine of the basic norm, the Pure Theory of law simply undertakes to lay bare the transcendental-logical conditions of the longstanding method of cognizing the positive law by analysing its factual procedure (Kelsen, 1934, p. 67).

This is a rather high-flown claim which is only partly justified. For Kantian philosophy, transcendental-logical conditions are those conditions of cognition which make reference to objects possible. They are the categories of understanding which can be extracted, according to Kant, from the possible functions of judgements; so for Kelsen, who levels out the difference between cognitive judgement and cognitional object and holds legal norms to be hypothetical judgements, the categories are identical with the ‘connector’ between antecedent and consequent of these judgements. Peripheral imputation, the specific legal Ought constituting the hypothetical judgement of the *Rechtssatz*, is such a category of relation; it might truly be said to be a transcendental-logical condition. The basic norm, on the other hand, is a presupposed fundamental rule offering criteria for legal validity, yet it is not really an applicable criteria rule but just a necessary corollary if one takes the constitution to be valid. The rela-

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10 This is especially apparent in those passages where Kelsen holds that, if one assumes a primacy of international law over municipal law, the basic norm of the municipal law transforms into a positive norm of international law, namely, the principle of efficacy (cf. Kelsen, 1934, pp. 70–72).

tion between the legal system, as an ordered system of cognitive judgements, and its presuppositions is one of equiprimordiality: while from ‘inside’ the legal system, the basic norm is necessarily given, it exists only relative to this legal system. One cannot exist without the other, and neither can be derived from anything else. So the validity of the legal system depends on its implicit basic norm, but making the basic norm explicit reveals that it is valid only relative to the legal system. This is responsible for its hypothetical character; it is in accordance with the function of the Pure Theory of performing a presuppositional analysis of the ‘factum’ of legal science: legal science as an institutionalized practice is given, and only if we are ready to accept that the claim of objective validity raised by legal scientists for their normative judgements is justified, do we have to acknowledge the validity or existence of certain presuppositions, the basic norm being one of them.

There is no real equivalent for this function in Kantian philosophy, and to call the basic norm a transcendental-logical condition is at least oblique. Yet, as shown above, neo-Kantianism tends to downgrade transcendental philosophy to a critical meta-theory of an existing scientific practice, that is, a critical analysis of the presuppositions of the established sciences, those non-factual conditions which are necessary to make it possible. One might regard the basic norm as a transcendental-logical condition in this very weak sense of being not an object but an implicit general presupposition of legal science in practice.

#### **4. The basic norm as part of a grounding relation**

At first sight, grounding theory, with its claim of going ‘back to metaphysics’, seems to be scarcely compatible with a (neo-)Kantian approach. After all, Kant’s fame is as a destroyer of metaphysics. By contrast, grounding theory seems to rely on the notion that there is a world ‘in itself’, consisting of ontological layers. However, most grounding theorists avoid subscribing to philosophical realism, and indeed, a realist background theory does not seem to be necessary for their enterprise. Even for the general claim that grounding is ‘metaphysical’, the difference between the approaches is less grave than it appears. Kant did not abolish metaphysics but revised it, replacing traditional ontology with an analytics of the transcendental conditions of thinking. Likewise, grounding theory aims at a revisionary metaphysics, in a similar way replacing the traditional ontology of ‘what there is’ by a theory of relations concerned with ‘what grounds what’. Still, to make grounding compatible with the theory of the basic norm, it must be understood in a specific way: the elements connected by the grounding relation must be cognitive judgements. This is unproblematic because, for a neo-Kantian point of view, a fact is nothing but a true proposition or a valid judgement. So for this view, there is no decisive difference between saying that grounding relates valid judgements and saying that grounding relates facts; many grounding

theorists could accept having facts or true propositions as possible elements of the grounding relation. Under this interpretation, the asymmetry, irreflexivity and transitivity features can easily be accounted for. If judgement  $p$  grounds judgement  $q$ , then judgement  $q$  does not ground judgement  $p$ . Any judgement  $p$  does not ground itself. If judgement  $p$  grounds judgement  $q$ , and judgement  $q$  grounds judgement  $r$ , then judgement  $p$  grounds judgement  $r$ . In an analogous manner, the feature of factivity means that grounding connects only valid or true judgements; the feature of synchronicity means that it is impossible that grounding and grounded judgements are not valid at the same time.

The feature of metaphysical priority is more difficult to capture in terms of judgements. It can perhaps best be explained by saying that in all possible worlds where the grounding judgement is valid, the grounded judgement is valid as well, while it is still somehow possible to think of the grounding judgement without thinking of the grounded judgement, due to the phenomenon of hyperintensionality mentioned above. And maybe the specific 'by virtue' function, the material component of grounding, can be captured by saying that the grounding judgement is in some non-empirical and non-analytical way 'responsible' for the validity of the grounded judgement.<sup>11</sup>

#### **4.1. The basic norm as the apex norm of the legal hierarchy**

As part of the legal hierarchy, the basic norm is the last element in a sequence of higher-level rules determining the conditions for norms of a lower level to be valid; so far, it plays the role of any 'higher' norm in the *Stufenbau*. Can it be assumed that such higher norms 'ground' the lower-level norms? Without straining language, one might say that the lower-level norm exists 'in virtue of' the higher norm, given the indeterminacy of the expression 'in virtue of'; the relation may be taken to be asymmetric, irreflexive and transitive.

But there does not seem to be synchronicity. It is correct to say that the lower-level rule cannot exist without (some) meta-rule determining exact criteria for its existence. Yet the meta-rule might well exist without the lower-level rule: it is a regular feature of legal systems that a law empowering someone to issue norms exists before the norms it validates come into existence. The related demand of factivity seems to pose a similar problem. Still, these difficulties might be overcome in the special case of the basic norm, because it seems to be impossible that the basic norm and a valid constitution exist without each other.

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11 David Chalmers has attempted to assimilate metaphysical grounding to conceptual/analytical grounding, promoting the thesis 'When P and Q are composed of transparent concepts, P metaphysically grounds Q if and only if P conceptually grounds Q' (2018, p. 9), with P conceptually grounding Q if the truth of P fully explains the truth of Q by virtue of the concepts involved. Should this enterprise be successful, it would be a big step towards fully reconciling metaphysical grounding with a Kantian position.

A worse problem is that any higher-level norm does not seem to ‘fully’ determine the validity of the lower-level norm; without any factual act, there would not be a lower norm with a certain content. So the higher norm might at best be a ‘partial’ ground for the lower norm; the full set of grounds would include some norm-positing act. This, however, is problematic for two reasons: on the one hand, it contradicts Kelsen’s thesis that the higher norm alone is the ‘ground’ of the validity of the lower norm, while the factual law-giving act (and its content) only ‘conditions’ it (Kelsen, 1922a, pp. 93–95). On the other hand, grounding theory claims that grounding is a ‘finer-grained’ relation between elements, being able to express distinctions which cannot be captured by analytical or modal relations. But if the higher norm, as a meta-rule, and the factual act which is norm-creating ‘by virtue of’ the higher norm are indiscriminately stuffed into the set of ‘partial grounds’, any differences between them seem to be steamrollered, and grounding seems in fact to be too *coarse-grained* a relation to reconstruct the legal hierarchy with.

A partial solution might be to regard validity, contra Kelsen, not as the *existence* of a norm, but as a *quality* that transforms the subjective meaning contained in acts claiming to be norm-positing into an objective meaning-content: a legal norm. In this case, it might be said that the higher norm fully determines not the lower norm altogether, but only the quality which distinguishes something which is just a claim to normativity (a subjective meaning-content) from a norm (an objective meaning-content). This solution might also solve the problem that, according to Kelsen, any higher norm does not provide the content of the lower norm.

But there is another difficulty. In grounding literature, it is regularly assumed that facts of an object-level ground facts of a meta-level. For example, the fact that snow is white grounds the fact that the sentence ‘Snow is white’ is true, but not vice versa (even though they are equivalent) (Correia & Schnieder, 2012, p. 1). As shown above, the higher norm belongs to a meta-level vis-à-vis the lower norm because it ‘thematizes’ this norm in a general way by determining criteria for its validity. Now, if one assumes that the higher norm grounds the lower norm, then it seems to follow that in the case of the legal hierarchy, the meta-level grounds the object level; that is, it is metaphysically prior to it. This would be strange, to say the least.

#### **4.2. The basic norm as a transcendental-logical condition**

It was shown above that the basic norm as a transcendental-logical condition is not a ‘given’ fundament of the legal system, with the latter ‘resting’ on it; rather, it is the result of an analysis of the presuppositions of an existing intellectual practice. This is what makes up its hypothetical character: if the law is valid, then the basic norm exists; conversely, the validity of the legal system depends on the existence of the basic norm. This is a kind of interdependence or equiprimordiality that seems to be a central feature of any Kantian-minded philosophy. In the *Critique of Pure Reason*, it can be found in the relation between subject and object, or between the tran-

scendental unity of apperception – the ‘I’, the possibility of which accompanies any of ‘our’ representations – and ‘the world’ as referred to by the system of our objectively valid judgements; for neo-Kantians, it is found in the interdependence between the successfully operating sciences and their presuppositions (e.g. Cohen, 1885, p. 77). (A late offshoot in the sphere of practical philosophy seems to be Rawls’ theory of a ‘reflective equilibrium’; on this concept, see Knight, 2023).

How does the basic norm as part of such a hypothetical relation of equiprimordiality fare when assessed with the conceptual means of grounding theory? Of the more or less uncontested features of grounding, transitivity poses no difficulties: if the basic norm grounds the constitution, it also grounds the norms which are grounded by the constitution. However, the features of irreflexivity and asymmetry are troublesome. While, on the one hand, it seems that the basic norm is on a ‘higher’ level vis-à-vis the legal system, so that, logically, they are not equally ranking, it is nevertheless the case that the existence of the legal system allows us to conclude that there is a basic norm triggering it, and it is impossible for the basic norm to exist without a legal system adhering to it. As shown above, it is a matter of interdependence, which seems to be incompatible with the ‘directedness’ of grounding.

There are two possible ways of getting out of this predicament. The first might be to say that irreflexivity and asymmetry are not necessary elements of a grounding relation. The second might be to point to the fact that the basic norm is only implicit on the level of the positive law; it is explicit only on the level of meta-theory. Belonging to different levels in this sense seems to exclude genuine symmetry and, together with it, reflexivity. However, on the one hand, the different levels are still in a peculiar relation of coequal balance: think one element away, and the other one vanishes. On the other hand, the argument seems also to be destructive to the assumption that there is a grounding relation between the basic norm and the legal system: can something which is part of a meta-level vis-à-vis the whole legal system, and only implicit on the level of the law itself, really ‘ground’ it?

As for the further features of grounding, there is no problem with synchronicity; in fact, equiprimordiality seems to afford that both elements co-exist at the same time. However, given the hypothetical character of the basic norm, the feature of factivity is doubtful. Again, neither the basic norm nor the legal system exist unconditionally – they condition each other; clinging together, they ‘float in the void’, as it were.<sup>12</sup> What is a fact is the institutionalized legal practice, but this alone does not suffice to say that both the system of legal norms and the basic norm are (normative) facts. Kelsen’s approach is not to say ‘the law exists *because* it is grounded by the basic norm’; rather, he says, ‘the law exists *if* the basic norm is presupposed’.

The basic norm as a transcendental-logical condition does not seem to live up to the demand that the ground should fully determine the grounded element. It cer-

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12 See Kelsen’s (1934, p. 36) standpoint that there might be no law for the anarchist.

tainly does not determine the content of the legal system. Even if we accept the solution mentioned above that the basic norm does not ‘ground’ the constitution but only its feature of being ‘valid’, there is still the problem that the basic norm as a presupposition is just parasitic to the legal system; it does not determine it in a significant sense.

#### **4.3. An alternative conception: The basic norm as a bridging principle**

Finally, a short look at a completely different attempt to apply grounding theory to the theory of the basic norm which might be more promising. In a recent paper, George Pavlakos (2021, pp. 473–489) defended the view that, from a Kelsenian perspective, legal norms are not grounded by other legal norms but by natural facts. This is not an unusual move; taking natural facts to ground legal facts is a common view in grounding theory, and there are indeed arguments speaking for such an interpretation. Grounding is a matter of non-causal and non-analytical determination; the ground is responsible both for the ‘that’ and for the ‘how’, for the existence and the quality of the grounded element. For a legal positivist view of a Kelsenian hue, it seems to be natural to assume that there is such a dependence relation between fact and law. Pavlakos’ conception seems to be better suited to accounting for several of the features of grounding named above than the relation examined in this text. The relation between norm-positing facts and the law is asymmetric and irreflexive, and the peculiar feature that the ground allows inference of the grounded element, while it is still conceivable that the ground exists without the grounded element, is given as well: only a certain constellation of natural facts allows us to infer that there is a legal norm, and at the same time, the legal norms might be ‘thought away’ and the natural facts would still exist. However, there are some smaller snags and two big ones.

The features of factivity and synchronicity are problematic. Synchronicity demands that both ground and grounded element are given at the same time, which is not the case with law-giving acts and the legal norm. Usually, the law-giving act exists just momentarily, and the legal norm comes into existence only once the act is completed and is valid until derogated. So there is no synchronicity. Again, according to Kelsen, the validity of law is hypothetical; the argument of the anarchist who fully concedes us all the natural facts we want and still denies that there is such a thing as a legal norm is unanswerable. This seems to speak against the demand of factivity being fulfilled. But there are worse problems: first, the conception is not compatible with the fundamentals of Kelsen’s theory, the basis of which is the dualism of Is and Ought, or the thesis that it is not possible to infer norms from a completely non-normative set of facts. Accordingly, Kelsen is quite adamant on the point that it is not possible to ground norms on facts. Facts may ‘condition’ norms, and they are responsible for the content of legal norms, but they can never ‘ground’ them or be responsible for their existence or validity:

If we trust the common parlance, it almost seems as if the *last* sovereign ground of an Ought must always be an Is fact, be it an act of commanding by the state, an absolute monarch, god, the conscience or reason: there always seems to be a real fact which the question after the ‘why’ of an Ought hits upon. But this is only an inexact and sloppy use of language which belies the logical relations. I *ought* to behave in a certain way not because God, conscience or reason commands it, but because I *ought* to obey the commands of God, reason or conscience. (Kelsen, 1920, p. 95)

This seems to be contrary to Pavlakos’ conception, which takes natural facts to ground norms, thus allowing to infer Ought norms from Is facts.

Second, in an attempt to solve the puzzle of how the grounding relation between fact and norm might be established and/or detected in spite of the dualism of Is and Ought, Pavlakos introduces the notion of a ‘bridging principle’ that connects ground and grounded element, thus turning the dyadic relation of ground and grounded element into a triadic one of ground, bridging principle and grounded element. He takes the principle which bridges fact and law, in the framework of Kelsen’s theory, to be the basic norm (Pavlakos, 2021, p. 486). This might indeed be a partial remedy which explains how the grounding relation comes about in spite of the Is/Ought dualism. However, *every* ‘higher’ norm in the legal hierarchy would have to count as such a bridging principle, because, as a competence norm, it connects certain empirical acts with a resulting norm, sewing together Is and Ought, as it were, and the special nature of the basic norm as an implicit presupposition of any cognition of law, its ‘symbiotic’ relation with the legal system, is lost in this model.

But this is just a minor flaw. The main difficulty is that the status of the bridging principle is questionable. To be sure, there are many grounding theorists who rely on such ‘bridging principles’ or ‘enabling conditions’ in order to make the relation between ground and grounded element comprehensible.<sup>13</sup> But there seems to be something wrong about it. What exactly is the function of the bridging principle? Is it just a heuristic means to make a pre-existing grounding relation ‘transparent’? Some passages in Pavlakos’ text seem to insinuate as much, for example when he writes about the bridging principle being needed for the ‘epistemic’ transparency of the grounding relation (2021, pp. 485–486), and about the basic norm’s task being to ‘bridge’ the ‘epistemic gap’ between its elements (2021, p. 487). In this case, however, there would still be the question of how the basic norm enables us to cognize a pre-given grounding relation. Even if the relation between ground and grounded element might be made ‘transparent’ by the basic norm, the relation between the basic norm and the grounding relation itself would stay ‘opaque’ (to use Pavlakos’ term), as would the

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13 On the necessity of general laws constituting the grounding relation, see Rosen (2017, pp. 279–301).

origin and justification of the basic norm.<sup>14</sup> Also, the ‘heuristic’ solution would not be compatible with Kelsen’s theory, for the basic norm is, for Kelsen, *constitutive* of the legal system. It is not just instrumental in getting cognitive access to a pre-existing legal system; rather, there would not be a legal system without it. Besides, if the basic norm just enables cognizance of a pre-given grounding relation between facts and norms, introducing it would not remedy the violation of the Is/Ought dualism.

Or is it that the bridging principle is not simply a heuristic means but is constitutive of the grounding relation – does it ground the grounding relation, so to speak? This would be more in accordance with Kelsen’s approach, and it would remove the violation of the Is/Ought dualism; but the problem with this solution would be that the bridging principle would be more fundamental than the grounding relation itself. Grounding would be neither primitive nor fundamental. Furthermore, as David Chalmers has argued, founding the grounding relation on a metaphysical law, external to the elements of the grounding relation, is a ‘fundamentally foreign conception’, because the convincing intuition connected with grounding is that it should be a relation derived from the ‘nature’ or ‘essence’ of its elements (2018, p. 10).

One might well ask whether introducing a bridging principle as a constitutive law does not shift the explanatory force of the grounding relation from the ground to the bridging principle, thus dissolving an explanation based on a grounding relation into something which strongly resembles the traditional deductive-nomological model of explanation: the Hempel–Oppenheim scheme, according to which the statement of a general law and a statement to the effect that the condition named in the general law is given together ‘explain’ the statement that can be deduced from them. In this case, the grounding relation would simply be the result of an application of general laws; it would not be a primitive or substantive philosophical concept and would run risk of falling prey to Occam’s razor.

In fact, the affinity of the triadic conception of grounding to the deductive-nomological model of explanation seems to be a point where grounding theory and neo-Kantianism might meet; the deductive scheme is compatible not only with the neo-Kantian focus on general laws as the fundamental building bricks of reality, but also with Kelsen’s own depiction of the legal hierarchy according to which the higher norm is a hypothetical if–then judgement which, together with a judgement confirming that the antecedent of the higher norm is fulfilled, allows the lower norm to be inferred (and thus explained).

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14 ‘Opacity’ means in this context that it is not apparent how the connection between the elements is established, so that there is an explanatory gap; there might be ‘different mappings’ as Pavlakos calls it. ‘Transparency’ is given if the ‘how’ of the connection is apparent; it is achieved by bridging principles.

## Conclusion

The conception of the basic norm is an integral part of two different segments of Kelsen's theory. On the one hand, it is part of the theory of the legal hierarchy which is expressive of *Begründungsdenken*; it serves as the last-level rule laying down criteria for legal validity. On the other hand, it is part of Kelsen's neo-Kantian epistemology; it serves as a transcendental-logical condition, that is, a general implicit presupposition, of the possibility of any legal knowledge.

In both functions, reconstructing the basic norm as a 'ground' in the sense of current theories of metaphysical grounding is difficult. In its function as part of the legal hierarchy, the relation between the basic norm and the constitution might be said to be asymmetric, transitive and irreflexive. Synchronicity is given; factivity is problematic. Also, there is no full determination of the legal constitution by the basic norm. Furthermore, the basic norm belongs to a logical meta-level vis-à-vis the constitution, so that a meta-level element would ground an object-level element. This is contrary to the intuitive meaning of grounding. If the basic norm is taken to be a transcendental-logical condition, the features of asymmetry and irreflexivity are problematic, because transcendental-logical conditions à la Kelsen stand in a balanced relation of interdependence with the judgements of institutionalized legal science: the law. There would further be the anomaly that an implicit element, the basic norm, would ground an explicit element, the law.

At first sight, a model which takes legal norms to be grounded by natural facts, with the basic norm operating as a 'bridging principle', seems to be more successful. The relation would be asymmetric and irreflexive, and, for a positivistic view, facts indeed seem to fully determine legal norms. But there seems to be no synchronicity, and the status of the basic norm as a bridging principle is highly doubtful. Its provenance and justification would be unclear. To take it to be (only) a *heuristic* means would presume that there is a pre-existing grounding relation between fact and law which just has to be discovered; this would not only violate the Is/Ought dualism, but would also be incompatible with one of the main tenets of Kelsen's theory, according to which there is no law without the basic norm. Yet to ascribe a *constitutive* function to the basic norm as a bridging principle would mean that the grounding relation between facts and norms is merely a by-product of the application of a general law.<sup>15</sup> Grounding could not be regarded as a primitive or fundamental relation, and it could, at least for present purposes, be replaced by a deductive-nomological model

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15 Supervenience might be a promising alternative to grounding if one wants to capture the relation between Is and Ought in law without neglecting the fundamentality of these domains or violating Hume's Law. This is elaborated in a forthcoming publication by Zalewska (2024).

of explanation. This, however, would fly in the face of the core intuition of grounding theory.<sup>16</sup>

Grounding theory is a rapidly developing domain, and there are not many tenets which can be regarded as fixed. By modifying the features of grounding, it might be possible to ascribe a grounding function to the basic norm. But the intellectual price to pay seems to be high, and the gain is doubtful.

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16 In a recent paper, Chilovi and Wodak (2022) maintain that grounding legal norms exclusively on facts is in accordance with the dualism of Is and Ought. In a nutshell, their argument is that Hume’s Law says that one cannot deduce any normative proposition from a set of purely non-normative propositions; this is a question of entailment. Grounding, on the other hand, is a metaphysical relation which is not congruent with entailment. If p entails q, there is no logically possible world where p is true but q is not. If p grounds q, however, there are possible worlds where p is true and q is not. How does this argument fare? First, it follows from the Is/Ought dualism, at least in its Kelsenian version, that the truth of any set of purely non-normative sentences alone never justifies taking any normative sentence to be true. This seems to exclude a grounding relation between facts and law because, according to grounding theory, if a set of full grounds is given in the actual world, the grounded element is always given as well. Otherwise, the ground would not fully determine the ‘that and how’ of the grounded element, and there could not be an explanatory function of the grounding relation. Second (and relatedly), if grounding does not mean that in every logically possible world where the ground is given, the grounded element is given as well, it is necessary to distinguish possible worlds where these elements go together (in some necessary way) from worlds where they do not. The only criterion available for this distinction is the existence, in those worlds where they do, of a general law constituting the relation. While this might leave the Is/Ought dualism intact, it deprives grounding of being a primitive substantial relation, as we just expounded.

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## The Personal Identity of the Human Being and the Right to Privacy from the Perspective of Standards of the European Court of Human Rights: Theoretical Legal Reflections

**Abstract:** This article seeks to present the problem of the personal identity of the human being as an important element of the right to one's private life being respected. The presentation is from the point of view of the guarantees related to the establishment of standards for the protection of human rights by the European Court of Human Rights in Strasbourg. Relevant for this reflection is the theoretical legal approach to this matter, with particular reference to the methods of interpretation of the European Convention on Human Rights. The article discusses the problem of understanding personal and social identity in a cultural context related to group and individual axiology. It presents historical determinants of the ideology of approaching the status of the individual within the state and the general standards of the right to have one's private life respected. Two key methods of interpretation for devising standards of protection, i.e. the evolutionary interpretation and the method of the cultural margin of assessment, are also analysed. Not only do these methods allow for taking changes in European social axiology into account, but they also allow for the distinctiveness of social axiology at the local level. From this perspective, an answer is given to the question, do the ECHR's standards for the protection of the right to respect for private life serve to reinforce the personal identity of a human being?

**Keywords:** European Court of Human Rights, judicial standards, personal identity, privacy, rules of interpretation, social identity

### Introduction

As Pietrzykowski wrote when conducting theoretical reflections on legal subjectivity, '[e]very legal order grows from the image of the world dominating within a given culture' (2015, p. 17). This image of the world, which depends on historical and axiological factors and political and economic circumstances, must be reflected

in a system of legal provisions and legal order which, by means of decision-making processes, becomes the law in action. The image is characterised by high dynamics often leading to smaller or larger changes which are a reflection of systemic and political transformations, economic processes, globalisation and social change, and which, if permanent and socially and politically acceptable, are subject to legal petrification. Alterations in the law and its institutions are the result of recognition of changes in its paradigms, which is closely correlated with those in the state and society. In this unstable world, surrounded by ever-different legal provisions, the individual functions as a legal entity. From both a social and a legal perspective, human identity is an individualised construct that is permanently engaged in relationships of various systemic complexity and completeness.

The concept of ‘identity’ was introduced in 1919 by Viktor Tausek, a Croatian psychoanalyst, lawyer, physician and journalist. It was then disseminated and kind of popularised by American human-development psychologist Erik Erikson.<sup>1</sup> Human identity is a matter that is mainly within the domain of psychology and other social sciences; in the understanding of these fields, reflection on identity is of a multidimensional nature. When defining identity, Golka (2012, p. 301) considers it an element of consciousness and a manifestation of the self-determination of humans, as an individual and as a collective. When Wróblewska writes about personal identity, she considers it as a system of two mutually complementary dimensions: the biological-vertical dimension is the temporal construct of a person’s connections and who they are, starting from the past, through the present and towards the future. The socio-horizontal dimension, on the other hand, is an analysis of the complex specificity of the personal ‘self’ at a given moment in time (Wróblewska, 2011, p. 178). From the point of view of the subject of this article, however, the theory of personal and social identity is of utmost relevance (Jarymowicz, 2000, pp. 107–125). Jarymowicz connects the former with the creation of the individual ‘self’ of a person, equipped with their own goals and standards of operation. On the other hand, social identity is manifested in the category ‘we’, understood as identifying one’s own person with members of a specific social group, which in consequence results in recognition of the values and rules of conduct of the group as also being the person’s own values and rules. One can ask the question whether the individual ‘self’ of a human being is always placed in the category of ‘we’. And then, how many categories of ‘we’ are in place, and are all the categories of ‘we’, and thus infinitely different ‘selves’, equally subject to legal protection?

Human identity is also an interdisciplinary issue, because the concept can also be studied in its political, cultural and religious dimensions or from the perspective of legal sciences. In the context of the latter, identity has a special reference to human

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1 The most influential works by Erikson include *Identity: Youth and crisis* (1968), *Identity and the life cycle* (1994), and *Dzieciństwo i społeczeństwo* (P. Hejmej, Trans.) (1997).

rights. It involves respect for the rights to privacy, family life, freedom of religion or freedom of expression. It should be borne in mind that postmodern society is subject to cultural and functional diversification processes:<sup>2</sup> it ceases to be homogeneous and becomes heterogeneous. A previously relatively heterogeneous social group becomes fragmented, and many social groups with different interests are formed as a result of this multiplication. This diverse society is incapable of developing a single cultural model (Goodman, 1997, p. 46), because there are many patterns and values in a heterogeneous society that should be mutually accepted and should not be approached in a confrontational manner. It is the legislature's task to reconcile conflicting interests. In such a 'world of far-reaching diversity (of cultures, societies, values, roles and attitudes) and hardly manageable variability (of fashions and models of interpersonal, professional and physical attractiveness), the question of one's identity becomes not only important, but also urgent' (Batory et al., 2016, p. 13). In legal terms, the importance of this issue entails the question of whether human identity is subject to effective legal protection.

From a theoretical point of view, we are witnessing processes that should counterbalance the scale and dimension of the changes taking place in society and law. Of course, the postmodern world has created a paradigm of diversity in social groups, cultural patterns and legal systems. At the same time, however, globalisation and integration processes strive to alleviate the effect of these divisions. Despite doubts about the meaning of the term 'globalisation', the socio-economic roots of the concept are indubitable; it means social and economic changes based on the intensification of connections between people from all over the world. Jan Aart Scholte takes the view that modern concepts of globalisation are cognitively futile. The author states that many, if not most, available analyses of globalisation have one disadvantage: they are cognitively empty, redundant, that is, they add nothing new to what is otherwise known. He adds that all four main definitions, depicting globalisation as internationalisation, liberalisation, universalisation and westernisation, have waded into this blind alley. He proposes a defining concept that allows globalisation to function as a process of spreading relationships between people across the planet, and writes that the ability of people to engage with each other, in physical, legal, linguistic, cultural and psychological terms, regardless of their location, grows with globalisation (Scholte, 2006, pp. 55–81). Globalisation is closely linked to cultural unification and the processes of building transnational integration structures. This, in turn, means an attempt to reverse processes of division in favour of integrating different elements into a single whole (states, values, cultures, legal systems). Is this balancing possible? It probably is – or perhaps it is better to say that it is possible to some extent, but in many cases it will still prove to be unattainable. With regard to human identity,

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2 It is usually stated in the literature on legal philosophy and sociology that the era of modernism ended in the mid-20th century.

the effect, according to some experts in the field, is sometimes the opposite. According to Golka, '[p]aradoxically, globalisation and mass culture have caused a demand for various local and individual identities on an unprecedented scale' (2012, p. 77). The question arises of whether, in such a situation, the human right to respect for one's identity is sufficiently and effectively protected.

## **1. The ideology of the approach to the status of the individual within the state and the personal identity of the human being**

From the philosophical point of view, our understanding of human rights was formed by the ideology of the Enlightenment, which was then adopted and accepted in the 17th century by the political doctrine of liberalism. Individual rights and natural rights became the pillars of modern concepts of human rights. In the global dimension, however, there is no universal consensus concerning the adoption of a universal concept of human rights and thus the construction of a definition of the status of the individual within the state. This is prevented by cultural, political and also legal considerations. There is also no doubt that the western cultural model of interpreting the world dominated the post-war debate, and consequently the normative concept of human rights developed in the forum of the United Nations. The concept of human rights, 'built on the inherent dignity of every human being, is based on universalist claims' (Górski, 2012, p. 77). This means that human rights are meant to be universal and these rights are vested in all human beings. One has to agree with Jagielski, who writes that '[t]he concept of human rights, after all, was formed in the turmoil of ideological struggle for liberating individuals from the omnipotence of the state' (2015, pp. 140–141). Humans have gained autonomy because human rights have a legal-natural origin and are inherent and inalienable, but also because of the right to demand that the state respects and protects these rights.

The one-sided approach to human rights in terms of personal rights is not actually questioned in European culture. These rights have no complement, as is the case in the philosophy of the Far East (Kosmala-Kozłowska, 2013, p. 503), according to which rights must be complemented by duties. Human rights, understood as *yang*, are coupled with *yin* duties. As Stępień writes, '[t]he relationship between them may vary, but it is impossible to talk about one without taking the other into account' (2012, p. 54). In this eastern way of thinking, the foundations of cultural relativism materialise. Universalism is questioned by Asian countries, perhaps for the sake of defending their regional values and not just to taunt the praise of Eurocentrism. Nonetheless, I believe that the norm, prominent in western culture, which prohibits discrimination for any reason, is an objective argument for the systematic acceptance of cultural differences. In the culture of the Far East, every person first fulfils their

duties towards their family, local community and ultimately the state, and only from this perspective may the issue of one's rights be considered.

In the European formula that shapes the status of the individual within the state, the formulation and dissemination of the concept of individual rights turned out to be a crucial turning point. This is particularly evident when we look at legal-historical findings. In this context, the work of Sójka-Zielińska seem to be of particular interest; when analysing the status of the individual in the Middle Ages, she argues (2000, p. 102) that people were not independent but were integrated within the mechanisms of collective life, and the individual interest was completely subordinated to the common good. As a result:

legal relationships were not so much about someone's right in the sense of a claim against another, but the obligation for others to comply with the order established by law, customs, tradition and religion. For example, the need to pay the debt was not due to the creditor's claim but to the fact that the debtor undertook, in solemn forms and gestures, to pay the debt. (Sójka-Zielińska, 2000, p. 102)

In these circumstances, the focus was undoubtedly shifted from rights to duties. This way of thinking seems to have continuously dominated the philosophy of the Far East for centuries. Even if the concept of individual rights was not known in the historical, pre-modern, European approach, Enlightenment thought did not develop in complete isolation from previous philosophical achievements. For example, according to Merkwa (2018, p. 327), one can equate the Enlightenment project of human rights with the concept of natural rights. The notion of a person as an individual being not only arose in the Enlightenment; by devising religious concepts of the law of nature, the Church recognised the divine order of the universe, in which the qualities of the individual were 'the inner freedom and natural equality of all people' (Sójka-Zielińska, 2000, p. 104). It can therefore be said that concepts and ideas have been developed over many centuries in European culture, and ultimately became the basis of the modern concept of human rights. This is culturally determined by universalism and is based on attributing natural and innate character, universality, inalienability and indivisibility to human rights. This set of five determinants of human rights, supported by the attribute of dignity, delimits the modern concept. If we classify human rights as individually understood rights of the individual, then humans are the subject in whom these rights are vested – and while they are the ones who are entitled, there must also be someone who is obliged. International human rights acts leave no room for doubt: the obliged entity is the state. This formula is prejudged by Article 2 of the International Convention on Civil and Political Rights, which states in paragraph 1: 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race,

colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status' (United Nations, 1966, p. 171).

Undoubtedly, the concept of human rights adopted in the European legal space and, above all, its dimension of an individualistic approach to the status of a person within the state is conducive, at least theoretically, to the realisation of human personal identity. At the same time, personal identity that is closely linked and integrated with an individual is so diverse that it seems reasonable to ask whether it is sufficiently protected in the legal dimension of the European Convention on Human Rights and the case law standards of the Strasbourg Court.

## 2. The right to privacy and the personal identity of humans

The right to have one's private life respected is often referred to in common but also legal language as privacy or the right to privacy. As compared to other human rights, this is a special right because it concerns the area of human life that is essentially taken out of the state's regulatory omnipotence. The essence of privacy is to limit any external interference in the *privatus* (personal) sphere. It may be stated that the right to privacy is understood in an axiomatic, contextual and individualised manner, because it is largely based on an individual level of human sensitivity, which results in different assessments and perceptions of similar situations; it is therefore difficult to define. The first to attempt to exemplify this concept were Brandeis and Warren in 1890. The American professors regarded privacy as a right to exclusivity, distinctiveness, secrecy and to be let alone (Brandeis & Warren, 1890; Tokarczyk, 2003, p. 93). These four components of privacy determine the strictly personal nature of this right. Today, the attributes of privacy include, among other things, the identity of a person, their physical integrity and sexual life, the secrecy of correspondence (now mostly electronic), medical data and information, as well as the right to establish and maintain relations with other people. It is therefore a very broad sphere of human autonomy.

The normative formula of the right to privacy adopted in international human rights instruments is very terse. It is not just the domain of regulation of this particular right, but a conscious regulatory method adopted in international law based on the assumption of the participation of international courts in the specification of the meaning of privacy. In other words, international courts will detail the general regulations by creating jurisprudential standards. This assumed regulatory economy is particularly evident in the regulation of the right to have one's private life respected. Privacy itself is not subject to definition. The acts only state that a person has the right to have their privacy respected and link the right to privacy (usually in a single provision) to respect for family life, home and correspondence (Article 8(1) European Convention on Human Rights (ECHR), or Article 7 Charter of Fundamental Rights

(CFR)<sup>3</sup>), as well as to the right to marry and start a family (Article 12 ECHR, Article 9 CFR), the right to protection of personal data (Article 8 CFR), the right of access to documents (Article 42 CFR), or freedom of movement and residence (Article 45 CFR).

Failure to define privacy in international law acts, and also in Polish law (Article 47 of the Polish Constitution), should be regarded not only as intentional but also as pragmatically necessary. Human privacy is a sphere of extremely dynamic and often truly revolutionary transformations. Cultural change, correlated with generational change, results in a modified understanding of the concept of privacy. The role of courts and tribunals should not only be to develop and clarify the concept, but also to ensure that it is adequately protected.

Every human right is rooted in the privacy of the human being and their subjectivity (Leszczyński & Liżewski, 2008, p. 90). Privacy is a very 'capacious' right, because it can be contextually related not only to the strictly personal sphere, but also to economic or political interests, and it can even go beyond the individual dimension, e.g. in the case of minority rights. At the same time, the right to privacy is susceptible to limitation. This may result from technological progress enabling both other individuals and the state to interfere with privacy, even unlawfully, for example through surveillance of individuals (e.g. through Pegasus spyware, software for electronic surveillance of a smartphone or computer which is capable of intercepting virtually any content of the infected device). Interference with privacy may also be legally justified, for example to counteract terrorist activities. Therefore, the basic European Court of Human Rights (ECtHR) standard creates the right of every person to freedom from interference, which nonetheless is not absolute (restrictive clauses). On a positive note, respect for privacy includes the protection of the physical and mental integrity of the person. The ECtHR concluded in the case of *Botta v. Italy* (Judgment of the ECtHR, 1998) that the physical and mental integrity of a person includes the right to live in a manner consistent with one's own preference and without the control of others. It is the right to establish and maintain contacts with other people (also in the intimate sphere) in order to develop one's own personality. ECtHR standards cover, inter alia, specific issues, such as limitation on the possibility of choosing a child's forename (Judgment of the ECtHR, 1996), the problem of changing surname (Judgment of the ECtHR, 1994), recognition by the state of the current gender identity of transsexuals after surgery (Judgment of the ECtHR, 1997), collection of personal data by state intelligence services (Judgment of the ECtHR, 2000) and permission for press publications disseminating photos of a child without consent (Judgment of the ECtHR, 2004).

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3 The Charter of Fundamental Rights was adopted on 7 December 2000 in Nice. It was given binding force by the Treaty of Lisbon, signed on 13 December 2007, which entered into force on 1 December 2009.

Identity is the sphere of a person's self-definition as an individual, closely linked to a sense of one's own separateness and uniqueness (personal identity) and the identification and belonging of the individual to a particular social group (social identity). Identity thus understood is, of course, part of the right to have one's private life respected and the general standards of this right as formulated by the ECtHR. Privacy and identity are not synonymous but overlap semantically to a large extent. In the ECtHR's judicial practice, the Court has repeatedly addressed the issue of identity and its determinants (ethnicity, nationality, religion, sexual orientation and physical appearance), taking a position on matters that are obvious and also on those that can be described as hard cases. In most of these cases, it has placed identities within the sphere of Article 8 ECHR, i.e. the right to respect for private and family life, sometimes in conjunction with Article 9 (freedom of thought, conscience and religion) or with Article 14 (providing for the prohibition of discrimination).

It is difficult to analyse the whole sphere of the personal identity of the individual and the aspects discussed by the Strasbourg Court. One of the many important features is the standard concerning the gender identity of an individual. Respect for gender identity as a standard of jurisprudence has been established in the case of *Goodwin v. UK* (Judgment of the ECtHR, 2002). In that ruling, the Court held that the person's request for legal recognition of their gender reassignment by public authorities was fully justified. The ECtHR found that this request falls within the scope of Article 8 and, according to the second paragraph, a person may be deprived of this right only in justified and proportionate cases. This position has been confirmed in the judgments in *Van Kück v. Germany* (Judgment of the ECtHR, 2003), *Grant v. the United Kingdom* (Judgment of the ECtHR, 2006) and *L. v. Lithuania* (Judgment of the ECtHR, 2007). The case of *Hämäläinen v. Finland* (Judgment of the ECtHR, 2014) seems particularly interesting and complex at the same time. The core of the problem in this case was a conflict in the sphere of values: a married man had changed gender and therefore demanded a new ID number indicating that he was a woman. A negative decision was issued under national law; the legal recognition of the surgical gender reassignment was refused by the Finnish authorities on the grounds that the condition of non-marriage was not met. If such consent were given, a marriage between two women would be accepted, although same-sex marriage is not provided for in Finnish law. This was therefore a collision between the right to respect for the private life of a transsexual person and the right to marry exclusively between opposite sexes, which is recognised by law in Finland. Based on this case, the Court decided that there is no consensus within the European legal area as to the possibility or the definition of the legal grounds for gender reassignment. This issue is still not perceived in a similar way in all European societies, which means that it does not fit into the canon of generally recognised moral and ethical norms. The Grand Chamber observed in their judgment that the parties did not challenge the infringement of the applicant's right to respect for private life by the refusal of a new identification num-

ber indicating the applicant as female (Judgment of the ECtHR, 2014, paragraph 64). However, that infringement, due to the margin of discretion enjoyed by states, does not amount to a positive obligation on the part of the state to provide for a genuine and accessible procedure enabling the applicant to validate their new gender legally while remaining in their previous marriage.

### **3. Do the ECtHR protection standards serve to strengthen the personal identity of a human being?**

The standards of human rights protection formulated by the Strasbourg Court have two dimensions. The first is to ensure a minimum level of human rights protection in the European legal space of the countries in the Council of Europe (CoE). This dimension is definitely based on what we could call the identity of the community of European countries. This type of identity is based on the acceptance of common values, awareness of common qualities and a sense of unity within the countries of the European cultural circle. The ECtHR, with regard to rights that have a social dimension (the right to privacy, respect for family life, freedom of assembly and respect for freedom of thought, conscience and religion), formulates standards of protection using certain generalisations. As regards privacy, it notes that privacy is the right of the individual to self-fulfilment without interference from third parties and the right to establish and maintain contacts with other people, both those based on intimate relationships and those based on relationships of friendship and acquaintance. The second dimension is an individual assessment of whether those standards of protection have been breached in a specific case, identified on the basis of features that are uniquely attributable to it. It can be said that the general standards of protection become the basis for applying a specific factual situation to them. The relationship between these two dimensions correlates with the relationship between social identity and personal identity referred to by Steven Hitlin. According to this sociologist, the element that binds these two types of identities are values, which have a social origin, but as a result of internalisation acquire a deeply personal meaning and become a determinant of personal identity (Hitlin, 2003). The question arises, however, of what happens when this internalisation does not occur in certain people.

When attempting to determine whether the ECtHR, when ruling on a violation of rights under the ECHR, protects human personal identity, it is necessary to consider what the interpretative determinant for the creation of standards of human rights protection is, since these rights are formulated in the Convention in a very general manner. This general nature of the provisions on human rights is kind of inherent in the method of normative formulation of these rights in international law instruments. It is the responsibility of international human rights courts to make the general regulations more specific by creating case law standards. The methods for

interpreting the ECHR developed by the Strasbourg Court differ fundamentally from those intended for the implementation of national law. They are supposed to take into account the dynamics of social change in Europe, with the broadest possible acceptance of the distinctions that exist at the macro level, i.e. in the CoE Member States.

The approach to methods of interpreting the ECHR, which result in the development of case law standards for human rights protection, is conducive, at least in theoretical terms and at least at first glance, to the acceptance of human personal identity and, consequently, the granting of legal protection. The ECtHR has developed its own distinctive methods for interpreting the Convention, which are intended to meet European perceptions of the values on which human rights are based. Particularly important in the context of this problem is that the ECtHR employs the methods of evolutionary interpretation (Liżewski, 2015, pp. 252–260) and of the cultural margin of appreciation (Wiśniewski, 2008, p. 482). The former is based on the assumption that the Convention should be regarded as a 'living instrument', to be interpreted in the light of current circumstances. This method is based on linking the interpretation of the Convention to social changes and the evolution of values. The ECtHR is becoming a 'benchmark of the morality of European countries' (Liżewski, 2015, p. 255); it is therefore the Court's responsibility to rule according to contemporary social values. The Court is therefore a body which first needs to establish current social values, and only in this context does it construct a standard of protection, on the basis of which it adjudicates on infringements of human rights under the Convention. The assumption of evolutionary interpretation requires the ECtHR to monitor social values on a regular basis. This means that if these values change, the standard of protection should also be modified. In this context, any change in identity within the community of European states should be reflected by the Court in the human rights standards.

The care about human rights standards being up to date throughout Europe is strengthened by the use of the concept of margin of appreciation. This is based on the assumption that the Court takes into account the specificity of local values when deciding on an infringement of human rights. It is therefore a method that allows for a modification of the level of standards of protection of a particular human right adopted in the CoE, if in a given country certain values are perceived differently than in most European countries. Golka writes that 'we often see Europe in cultural terms as unity in diversity and diversity in unity' (2005, p. 10). Despite the common axiological foundations of European civilisation, the societies of individual European countries perceive some values in a way that is characteristic for them. The development and application of this method by the ECtHR allows, as Garlicki (2008, p. 4) puts it, the drawing of a demarcation line between what should be left to local communities and what should, without exception, apply to all state parties as a common standard of protection. It must be concluded that the doctrine of margin of appreciation un-

doubtedly reinforces the ECtHR taking community identity into account, but only at the state level. However, is it possible, at least in theory, to claim that this method also fully protects the personal identity of an individual? It seems that if this identity falls within the accepted values of the community, it does; however, if personal identity goes beyond the accepted values, then the matter is much more complicated. The above-mentioned ECtHR judgment in the case of *Hämäläinen* (Judgment of the ECtHR, 2014) may be the basis to explain this problem. It turns out that the juxtaposition of the facts with the applicable standard of protection leads to a collision in the sphere of values. When some values are guaranteed, other are prevented from being realised.

## Conclusions

Despite the fact that the European legal space has adopted the concept of an individualistic approach to the status of a person within the state, it is difficult to fully guarantee that all individuals are treated with the full realisation of their personal identities in terms of the right to privacy. Both every human being and entire communities can take different attitudes towards the global cultural reality. Krzysztofik distinguishes five variants in attitudes; two extremes are the full acceptance of global culture and the total rejection of this culture. In addition, there are three intermediate attitudes: selective acceptance means partial approval of certain cultural standards and values, with rejection of some others; hybridisation involves the co-adaptation of cultures and is expressed in an attempt to combine universal values with local ones; finally, an attitude of cultural dualism is an attitude of participation in both global and national cultures (Krzysztofik, 2000, pp. 73–75).

Such a diverse typology of attitudes in postmodern and globalised Europe, linked to what we might call the 'diversity' of values, ideals, cultures, styles or consumption, affects both human identity and the process of its reconstruction, as well as the richness of identity formulas, especially in the individual dimension. To a large extent, this identity, in legal terms, falls under the right to respect for private life. This right has a specific range of meanings and is covered by legal standards generally appropriate to the cultural pattern adopted in a given legal order.

From the point of view of the method of developing standards of protection by the European Court of Human Rights, it is much easier to guarantee social identity at the local, community level within the framework of the right to respect for private life, because the concept of the cultural margin of appreciation requires the acceptance and protection of a different understanding of local (national) values. The specificity of local conditions is able to justify, at the level of protection standards, respect for the values of the regional community, understood somewhat differently from those resulting from a Europe-wide standard. However, the matter becomes more

complicated at the level of personal identity. The specificity of this identity is related to particular values that affect behaviour, views, attire, social interactions, etc. If such elements are legally irrelevant and socially neutral, they should be protected by law by virtue of the right to respect for private life.

It is different if the behaviour of an individual does not fall within the canons of socially acceptable behaviour or if the behaviour and claims of the individual lead to a collision in the sphere of values. In the former situation, the behaviour of the individual may be perceived as deviating (inappropriate behaviour). In view of the foregoing, the lack of social acceptance may also result in a refusal to grant legal protection to such conduct. Thus, the personal identity of an individual may not be legally guaranteed, even if, from the individual's point of view, it falls within the right to respect for private life (e.g. smoking cannabis in public places), on the ground that the person infringes the law. Probably as soon as behaviours perceived as deviating become adapted and socially acceptable, legal protection will also be granted to them (e.g. legal recognition of homosexual relationships). Denmark was the first country in the world to have the right to register single-sex partnerships, since 1989. At the same time, the legal systems of many countries in the world, such as Afghanistan, Pakistan, Saudi Arabia, Somalia, Sudan, Yemen, Nigeria, Mauritania, Brunei, Iran and the Chechen Republic in Russia, still provide for the death penalty for homosexual relationships.

In the second situation, even though it is recognised that a behaviour which is an externalisation of personal identity falls within the right to privacy, refusal of legal protection involves a conflict in the sphere of values. An example of such a situation was presented above, concerning the refusal of legal recognition of surgical gender reassignment due to the fact of being married; the refusal was related to the lack of legal sanctioning for same-sex marriages. It turns out that in a legally regulated institutional setting, one and the same behaviour can be legally accepted or unacceptable, due to a collision with another legally protected good.

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## Identity Claims and the Legal Order: Secular or Religious?

**Abstract:** The problem addressed in this article is the challenge that identity claims stemming from identity politics, commonly recognized as left liberalism, pose to the secularity of the modern legal order. The paper: (1) postulates human dignity as the highest value and assesses the potential of philosophy and law to find a balance among the conflicting demands posed by this value; (2) identifies constitutional principles and/or *jus cogens* as the basis for the identification and appraisal of identity claims; (3) describes major identity claims embodied in the Istanbul Convention and appraises them on the basis of the principles; (4) ascribes identity politics and its claims to a worldview with traits of a religion, termed culturalism, as their condition. The conclusion proposes alternative decisions (*de lege ferenda*) more in accord with the principles, most notably with the freedom of thought, conscience and religion.

**Keywords:** culturalism, human dignity, identity claims, identity politics, Istanbul Convention, legal order

### Introduction

The problem addressed in this article is the challenge that identity claims stemming from identity politics (second-wave+ feminism and the LGBTQIA+ movement), commonly recognized as left liberalism, pose to the secularity of the modern legal order. The paper performs the following tasks: (1) it postulates human dignity as the highest value and assesses the potential of philosophy and law to find a balance among the conflicting demands posed by this value; (2) it identifies constitutional principles and/or *jus cogens* as the basis for the identification and appraisal of identity claims; (3) it describes major identity claims embodied in the Istanbul Convention

stemming from identity politics and appraises them on the basis of the principles; (4) it ascribes identity politics and its claims to a worldview with traits of a religion, termed culturalism, as their condition. The conclusion proposes alternative decisions (*de lege ferenda*) that are more in accord with the principles.

## 1. Human dignity

The contemporary dominant view of human dignity relies on Kant's second variation of the categorical imperative, which reads 'Always act so that you treat humanity, whether in your own person or in another, as an end and never merely as a means' (Kant, 1785, 4:428–429; tr. Liddell, 1970, p. 138). The first variation commands 'Always act on a maxim which you can will to become a universal law of nature' (Kant, 1785, 4:421; tr. Liddell, 1970, p. 140), while the third variation is 'Act always on a maxim by which the will considers itself as making universal law' (Kant, 1785, 4: 432; tr. Liddell, 1970, p. 165) for a possible 'kingdom of ends', i.e. 'the orderly community of different rational beings under a common law'. Kant's variations of the categorical imperative incorporate Cicero's universal rules for the resolution of conflicts between duty and interests (Liddell, 1970, pp. 138–139): '*Omnino hominem ex homine tollat*' (Cicero, 1913, pp. 292–293) ('Honor every man as a human being because he is a human being') (Liddell, 1970, p. 139) (comp. Kant's 2<sup>nd</sup> variation); '*Convenienter cum natura vivere*' (Cicero, 1914, pp. 282–283) ('Live according to Nature, Nature as it would be under ideal conditions') (Liddell, 1970, p. 139) (comp. Kant's 2<sup>nd</sup> variation); '*Communis humani generis societas*' (Cicero, 1913, pp. 280–281) ('Live as a member of a universal society of rational beings') (Liddell, p. 139) (comp. Kant's 3<sup>rd</sup> variation). In Plato's writings, dignity was 'associated with unity based on internal harmony' (Piechowiak, 2019, p. 43; also see p. 255) and, predating Kant again, 'the prohibition on destroying a possessor of dignity [...] was not formulated with a view to achieving goals that go beyond the good of the possessors of dignity themselves, such as the good of the state or the universe as a whole' (Piechowiak, 2019, p. 44). However, 'treating a person as an end (in oneself) does not exclude the recognition that he is a part of a certain whole, which is also an end in itself; in Plato's thought it is the universe' (Piechowiak, 2019, p. 256). Kant's 'kingdom of ends' is akin to this too. Seemingly unrelated to Plato's and Kant's views of human dignity is Pico della Mirandola's (1956, p. 7 and *passim*) claim that humans have dignity because God created them to in His image, thus endowing them with free will to fashion themselves the way they choose.

Now, if every single individual is both a part and a creator of the universe, it is necessary to find multiple balances between a person, his/her community, and humankind, and between every single person and nature, in conservation as well as in

creation. Philosophy and law are two common responses to the challenge, and only seem to go hand in hand.

#### (A) *Philosophy*

Philosophy, being an enquiry into rationality, is indispensable as a check on any other enquiry that is meant to be rational. However, even in the performance of such a limited task, philosophy cannot cast away the doubt that it has come to an end (see Manser, 1973) – all the more so when philosophy *qua* philosophy, rather than as an underlabourer of common sense, science or literature, pronounces on politics, society, law, etc. It is an effort on a slippery slope, which seeks credibility in building, through free-roaming speculation, an all-inclusive view of its subject matter and, tacitly, a whole worldview, every brick of which creates an ever-deeper gulf between believers and non-believers. The idea that one can find necessary and/or satisfactory conditions for the use of the concepts of politics, society, etc. is not less pretentious.

#### (B) *Law*

Law limits creation by protecting, in addition to life, freedom of belief and expression. In this, it is informed by history, including the history of philosophy. The latter is both a repository of the ideas that are still usable (see sections 1A and 1C), and that often are used tacitly as presuppositions of current thinking, *inter alia* in formulating theoretical constructs, and a way of detecting fallacies. Since law is public reasoning, its corequisite is a study of humans. It should start with the insight that the personality of every single human being is a unique but natural ‘good’, unanalysable, undeterminable and irreducible to either experience or norms, which can only be understood teleologically, but which to that end does not need explicit or categorical metaphysics.

#### (C) *The mean*

Aristotle’s doctrine of the mean may temper choices between nature and nurture. Aristotle formulates the doctrine in discussing virtue or excellence (*aretê*) by explaining that ‘all excellence makes what has it good, and also enables it to perform its function well’. Thus ‘the excellence of a human being will be that disposition which makes him a good human being, and which enables him to perform his function well’ (Aristotle, 1984, 1106a16–25; tr. Losin, 1987, p. 329, 341 n. 2). The doctrine teaches that ‘[h]itting the mean is not so much a matter of hitting one particular point on a target as it is a matter of avoiding the variety of mistakes it is possible to make in a complex situation’ (Losin, 1987, p. 340). A mistake to avoid is an enthusiastic response to Pico della Mirandola’s claim, which is prone to treating ‘the world as an ensemble of objects for our use’ (Taylor, 1989, p. 513).

Aristotle's doctrine of the mean is *prima facie* closely related to, or even the source of, proportionality analysis, which is embedded in the theory of legal argumentation and presupposed by the rational application of constitutional rights. If so, the doctrine may reconcile philosophy with law, to a degree.

## 2. Constitutional principles

Constitutional principles and/or *jus cogens* as the basis for the identification and appraisal of the identity claims (see section 3) are of two kinds: historically, the secularization of the modern European state (see section 2A), or dogmatically, international and European human rights principles (see section 2B).

### (A) *The secular state*

Durkheim says that 'Religion is above all a system of notions by which individuals represent to themselves the society whose members they are, and relations, obscure but intimate, that underline it' (Durkheim, 1968, p. 219). 'Religion holds within it, from the very beginning, but in a muddled sort of way, all the elements that have given rise to the various manifestations or collective life' (Durkheim, 1980, p. 54). 'With the possible exception of economic organization, everything [...] was bound up with religion' (Fournier, 2013, p. 317).

The modern state is identical with the national legal order, as the state can be identified only by understanding the reasons, including the legal norms (rules, values, principles, institutions, etc.), that constitute it (see Kelsen, 1945). The state is structurally and genetically intertwined with the Catholic Church; structurally, the papacy in the 13th century was the prototype of the state (Picq, 2009, pp. 109–110), demanding religious obedience (see Hobbes, 1968, ch. 43, s. 3, p. 610). Genetically, the state has developed by separation from the Church (Berman, 1983; Maclear, 1995). This separation has been brought about by two institutions, the first being nationality. Nationals are the persons residing on a state's territory, irrespective of whether they are linked to a religious community, including the Catholic Church, or not. The second institution is freedom and equality: a religious community, and later on even a religious individual, is, on the one hand, free to profess his/her faith (in words, worship, etc.) and govern his/her affairs by his/her own laws within the limits of the state law set to protect the basic functions of the state; on the other hand, s/he is equal under the state law to other religious communities and individuals.

Freedom of belief and expression is a distinctly legal idea, which was informed by religious conflicts at the dawn of modern Europe (Picq, 2009). Meanwhile, the freedom has come to protect not only religious but also philosophical convictions (Foblets, Graziadei & Vanderlinden, 2010). The extension of the freedom protected by state law to philosophical convictions, and even to worldviews with little or no

philosophical underpinning, can be justified by the fact that they are all, more often than not, religions in Durkheim's sense. While the freedom is intentionally all-inclusive, in reality, often both what and from what the freedom protects is what legally counts as a religion (Padjen, 2010, pp. 477–514). Political community without religious tolerance, i.e. without minimal freedom of religious or other convictions, is not a (modern) state, although it may be – and often is – a state according to international law (e.g. Nazi Germany, Communist China).

#### *(B) Human rights*

Constitutional principles and/or norms of *jus cogens* as the basis for the identification and appraisal of the claims and decisions in sections 3B-C are selected from the following international instruments: the Universal Declaration on Human Rights (UDHR) (United Nations, 1948), the International Covenant on Civil and Political Rights (ICCPR) (United Nations, 1966a), the International Covenant on Economic, Social, and Cultural Rights (ICESCR) (United Nations, 1966b), the European Convention on Human Rights (ECHR) (Council of Europe, 1950) and the Charter of Fundamental Rights of the European Union (CFREU) (European Union, 2016). Several norms are written in identical or substantively similar formulations in more than one of these instruments (for reasons of economy, a selected norm is given in subsequent paragraphs in full or is abbreviated or given as a keyword, and is accompanied by references to its sources, listing the primary source first and indicating articles and sections by numbers only, e.g. UDHR 2; ICCPR 2(1), 26):

- Equality, non-discrimination (UDHR 2; see: ICCPR 2(1), 26; see ICESCR 2(2); ECHR Protocol 12; CFREU 20, 21).
- Everyone has the right to life, liberty and security of person (UDHR 3; ICCPR 6(1); ECHR 2(1); CFREU 2(1)).
- Freedom of thought, conscience and religion (UDHR 18(1); ICCPR 18(1); ECHR 9; CFREU 10).
- The right to hold opinions without interference (UDHR 19(1); ICCPR 19(1); CFREU 11(1)).
- The right to freedom of expression (UDHR 19(2); ICCPR 19(2); ECHR 10; CFREU 11(1)).

### **3. Identity claims**

An identity is by definition integrative. It spans one's whole life. A woman or a man of integrity can change greatly, perhaps even substantially, by transition from one gender, worldview, or way of life to another. But the person changing has integrity only if they change for a reasoned conviction and by bearing the consequences.

Their integrity is provided by both actions and interpretations. The latter consists of self-interpretations, i.e. making sense of ourselves by grasping our lives in a narrative or story, and interpretations given by the community we live in (Taylor, 1989, pp. 36–38, 47). The integrity includes a respect for ‘the demand that our natural surrounding and wilderness make on us’ (Taylor, 1989, p. 513). Prelinguistic communication, such as eye-to-eye contact between parent and child (Taylor, 1989, pp. 524–525), demonstrates the unbroken continuum between our natural surroundings and linguistic interaction. The continuum is constitutive of the identity of a human being.

The balance that is instituted by the location of self not in ‘the fastness of immediate private consciousness but in a cultural-historical situation as well’ (Bruner, 1990, p. 107) by cognitive psychology or, even more radically, by the philosophy of ordinary language (Wittgenstein, 1958) is precarious. It can easily be tipped to reduce the self to a mere knot in the texture of human history, devoid of nature. Identity politics is a case in point.

#### *(A) Identity politics*

Identity politics is commonly seen in the West as *the source of identity claims*, which is why they are the major concern of this article. Identity politics ‘has come to signify a wide range of political activity and theorizing founded in the shared experiences of injustice of members of certain social groups’ (Heyes, 2020, s. 1; also see Edgar & Sedgwick, 1999, pp. 183–187). The groups are, most notably, second-wave feminists, racial minorities (primarily in the USA) and persons belonging to the LG-BTQIA+ community, who came to prominence in the second half of the 20th century in Western liberal democracies (Heyes, 2020, s. 1). While the institutions of liberal democracy made identity politics possible, they have been unresponsive to identity claims, because liberalism cherishes individual rather than group liberty (although it protects corporate rights). Nonetheless, ‘some commentators have suggested a possible rapprochement’ between identity politics and liberalism (Heyes, 2020, s. 3).

One should expect an even more tense relationship between identity politics and the left, especially of Marxist provenance (Heyes, 2020, s. 4). However, identity politics has attempted to appropriate the standpoint theory of science from Marxism, defined as the theory that those who are oppressed have a privileged position to understand the social relations that constrain them (Simondon, 2001). By appropriating the standpoint theory, identity politics presents itself, and is widely accepted, as left liberalism, and even as the next in line to Marxism, especially in this century in Europe.

Of interest in this article are identity claims raised by feminists and the LGBT-QIA+ community as two wings of identity politics. The claims are concerned largely with human reproduction and relate directly to issues of sex and gender. They are also indirectly related to the same issues by dealing with speech about the issues (*sp. free-*

dom of expression v. hate speech) and legal regulation of them (freedoms v. rights, public v. private, duties v. conscientious objection, etc.). The third wing of identity politics, the claims of racial minorities, is not of interest here; they deal with issues of a different kind, especially colonialism and racism (though some of them overlap).

#### (B) *The Istanbul Convention*

The boldest claims that have been made and implemented by the first two wings in Europe demand a complex protection of women against gender-based violence. The claims have been implemented by the Convention on Preventing and Combating Violence against Women and Domestic Violence, conventionally known as Istanbul Convention (IC), agreed in Istanbul on 11 May 2011 (Council of Europe, 2011). The IC, which entered into force on 1 August 2014 (Council of Europe, 2024), ‘recognizes gender-based violence against women as a violation of human rights and a form of discrimination’ (Council of Europe, 2011).

A comprehensive criticism objects that the IC does not provide objective criteria for recognizing gender-based violence and for that reason merely assumes that violence against women is based primarily on gender rather than sex (i.e. the fact that men are stronger and perhaps more aggressive than women), race, colour or ethnicity (Hrabar, 2018, pp. 25–27; cf. p. 29). The IC, article 14, reads as follows:

1. Parties shall take, where appropriate, the necessary steps to include teaching material on issues such as equality between women and men, non-stereotyped gender roles, mutual respect, non-violent conflict resolution in interpersonal relationships, gender-based violence against women and the right to personal integrity, adapted to the evolving capacity of learners, in formal curricula and at all levels of education.
2. Parties shall take the necessary steps to promote the principles referred to in paragraph 1 in informal educational facilities, as well as in sports, cultural and leisure facilities, and the media.

#### (C) *Appraisal of the Convention*

Even a summary view of the IC, *supra* at B, suffices to offer the following tentative legal appraisal: the IC, by obligating the vast majority of the population who identify as sexual to identify as gender, violates the right to equality and non-discrimination (UDHR 2; see ICCPR 2(1), 26; see: ICESCR 2(2); ECHR Protocol 12; CFREU 20, 21), the right to liberty and security of the person (UDHR 3; ICCPR 6(1); ECHR 2(1); CFREU 2(1)), the right to hold opinions without interference (UDHR 19(1); ICCPR 19(1); CFREU 11(1)), the right to freedom of expression (UDHR 19(2); IC-CPR 19(2); ECHR 10; CFREU 11(1)) and, for some people, freedom of thought, conscience and religion (UDHR 18(1); ICCPR 18(1); ECHR 9; CFREU 10). By the same

token, a law obligating a single person, let alone a numerous group, who identifies/y as a particular gender to identify as a sex (female or male), also violates the right to equality and non-discrimination, and may violate the other rights stated in the preceding paragraph.

## 4. Culturalism as a condition

### 4.1. Worldview

Identity politics, and its claims described and appraised in section 3, can be seen, like any other social occurrence, as self-contained and unique. However, it can also be ascribed to a more inclusive worldview with traits of a religion (see section 4.2), termed culturalism. As a set of reasons for recognition of a reality and for action, culturalism can be seen as a condition that both motivates, as a *causa efficiens*, and justifies, as a *causa finalis*, identity politics and identity claims.

A worldview is a set of beliefs and demands. Left liberalism as a worldview, whose variant is identity politics, is labelled culturalism here (Padjen, 2017). The term parasitizes on cultural theory, verbally as well as conceptually (Edgar & Sedgwick, 1999). The tenets of culturalism are as follows: ‘humans are a product of culture in that nature, which had generated humans as well as other species, had been changed by humans to the extent that culture is the distinctly human nature and disponibile for further change by humans’; ‘humans can know human nature’ in three ways – through science (understood to be a social construct), art and introspection; and ‘a human being not only can but ought to change human nature totally’ (Padjen, 2017, pp. 139–141). Hence, the artificial is preferred to the natural.

Culturalism as a worldview treats everything as a narrative. It is epitomized by a conversation between a TV presenter and a geophysicist: ‘What was that story at 06:24?; ‘It was measuring 5.5 on the Richter Scale.’ While it would be preposterous to assert that culturalism is either the embodiment of certain philosophical ideas or, the opposite, a mere reflection of social or even natural forces, culturalism, especially its reduction of everything to narratives, can be traced to, as well as supported by, philosophy. For the purpose at hand, the philosophical dimension of culturalism is a construct with a purpose, rather than the interpretation of what a thinker or a group of thinkers have actually said or meant. The purpose is to pinpoint the assumption that underlies, or at least provides coherence to, the change in the widespread understanding of institutional facts, and the consequences of that assumption.

#### (A) *The assumption*

John Searle (1969, pp. 50–53) distinguished between institutional facts and brute facts in the 1960s. The latter are exemplified by force, chemical bonds and tectonic

plates, and are all observer-independent, i.e. they exist independently of us. Institutional facts are exemplified by baseball, citizenship or federations; they are all observer-relative, i.e. their existence depends on humans. Institutional facts are constituted by language. Yet the great sociologists – Weber, Simmel, Durkheim, Schutz – as well as great thinkers of the past took language for granted. Hence the difficulty of considering that ‘observer-relativity implies ontological subjectivity, but ontological subjectivity does not preclude epistemic objectivity’ (Searle, 2008, pp. 26–30). The change that Searle already noted in 1995 was that when he ‘baptized some of the facts dependent on human agreement as “institutional facts” [...] many people [...] have argued that all of reality is somehow a human creation’ (1995, p. 2). Hence, the construct that underlies, or at least provides coherence to, the change. It is the assumption that *language cannot say anything about the world but can nonetheless talk incessantly about itself as if it were not a part of the world*. This assumption may be seen as a prominent or even fundamental feature of modern philosophy. Of interest in this study is not the history of the idea but the possible reasons for and consequences of the assumption.

A *prima facie* reason is a reaction to the quest for the unity of science prominent in the late 19th and the early 20th centuries, i.e. to the self-fulfilling prophecy of construing enquiries into humans and society as part of a single science grounded in physics (Neurath, 1959). The reaction criticized such a quest and offered the idea of the social sciences, rooted in understanding social actions, which is beyond the reach of natural science (Giddens, 1974). A related reason for the assumption is the Procrustean need for a grand theory of society, and the realization that it is not possible.

The last such widely accepted theory in the West (that has spread all over the world) is Marxism. A reason why this has faded away even as a scholarly theory is that the Marxist (or any other) quest for social laws cannot be met, since strict social laws may never be discovered. ‘Many of the important and influential factors relevant to social behaviour are environmental and belong to such field of investigation as biochemistry, physiology, physics, and geography’ (Brown, 1984, p. 269).

Structuralist psychoanalytic theory, which has had a profound impact on contemporary thought, including feminism, insulates its subject matter from nature. The theory maintains that the ego, the autonomy of which is an illusion, is not biologically but symbolically determined; it is a psychological and social construct (Turkle, 1992, pp. 16–17; also see p. 235). It is both expressed and understandable by mathematics and poetry; contrary to Western philosophy and science, they are intertwined. Like poetry, mathematical creativity draws on the unconscious, and mathematics gives us a window back into the unconscious (Turkle, 1992, pp. 230–240). But psychoanalysis or linguistics are not science; the latter is expressed by equations (Turkle, 1992, pp. 236–237).

A step further, but not forward, is the idea that social sciences have been on the wrong path by trying to follow natural sciences rather than philosophy (Winch, 1990, p. 1 ff.). The latter is concerned with ‘the question of how language is connected with

reality. To assume that one can make a sharp distinction between ‘the world’ and ‘the language in which we try to describe the world’ [...] is to beg the whole question of philosophy [...] [S]ocial relations are expressions of ideas about reality’ (Winch, 1990, pp. 11–13, 23). Hence, ‘the central problem of sociology, that of giving an account of the nature of social phenomena, in general, itself belongs to epistemology [...] [it] is really misbegotten epistemology’ (Winch, 1990, p. 43). This is how philosophy, which had been reduced to an underlabourer of science (Winch, 1990, pp. 3–7), has been resurrected by philosophy whose central concern is language as a social science. It is more appropriate to state that such a discipline, which understands its subject matter and denies that it can be explained causally by social laws (Winch, 1990, pp. 75–86, 111–116, 123–125; see criticism in MacIntyre, 1971), is, in its own terms, closer to history than to sociology (Wright, 1971, pp. 139–141). Thus, the need for a grand theory of society after Marxism has been met from two very different sides – ‘in a pincer movement’ (Winch, 1990, p. 1), by a step back into philosophy whose whole world is language.

### *(B) Consequences*

The consequences of the assumption are a rejection of the correspondence theory of truth as metaphysical, and a recent acceptance of consensual theories of truth (Apel, 1973; Habermas, 1973; see also Skirbekk, 1977). The problem is that the consensus achieved by a correspondence of the syntactic and/or semantic dimensions of utterances only does not make them different from correspondence theories. A consensus can be valid if it includes pragmatic dimensions, which consist of the whole, consisting of language and the actions into which it is woven (Wittgenstein, 1958, s. 7). Practical philosophy devoid of theoretical considerations does not and cannot answer the prejudicial question of moral, political and legal enquiries, ‘who is a person?’ This is to say that a valid consensus presupposes the correspondence of actions as well as of words. It can only be established by a correspondence that, however naively, assumes the external world – including language, actions, artifacts, natural facts and, above all, human persons (rather than merely legal subjects) – does exist independently of language ‘in the head’ and can be known.

However, a reason for the assumption that language cannot say anything about the world but can nonetheless talk incessantly about itself, as if it were not a part of the world, may be the postmodern subject who is in pain (Conklin, 1998). She may accept that language about pain is public (Wittgenstein, 1958, s. 243–315), but her pain is nonetheless private, because it is utter loneliness, like a descent into hell (Ratzinger, 1968, pp. 247–255). It follows that language can talk about but not express or correspond to pain. Language is self-referential. Pain is the postmodern thing in itself. Perhaps our incessant e-communication is not an addiction but an attempt to ascent from loneliness.

## 4.2. Religion

Identity claims and corresponding legal decisions on human reproduction may also be ascribed to left liberalism as a philosophical conviction (Padjen, 2017, pp. 126–130). It cannot count as scientific; even a natural science, which is a model for social sciences, is inevitably underdetermined by facts and is value-laden (Hesse, 1978). For that reason, sciences are prone to sliding into speculation. What makes sciences different from speculations is that the former are to a significant degree determined by facts, and not overdetermined by values.

‘Underdetermined’, ‘determined’, and ‘overdetermined’ are inevitably vague terms, which cannot be made less so by a theory. All that can be done is to examine every single set of knowledge claims that belong to a science, or aspire to, in the light of the doctrine of the mean (see section 1C). No more reliable standard can be found if one admits the following tenet: it is possible to know piecemeal by everyday experience and sciences, both natural and social, but not comprehensively and systematically, the part of nature and the part of nurture in human development; hence, the allegedly comprehensive and systematic knowledge about the relationship between nature and nurture is speculation. Extreme instances of such speculations are, on one side of the spectrum, Ulpinius' dictum '*ius naturale est quod natura omnia animalia docuit*', i.e. '*ius naturale* is that which nature has taught all animals' (*The Digest of Justinian*, 2011, 1.1.10.1), and, on the other, the claim that even laws of physics are a social construct (see criticism in Hacking, 2001). The doctrine of the mean, while not capable of finding a perfect balance between the two extremes or between other arguments for nature and for nurture, can indicate excess.

Indicators of a grave excess may be acceptable to persons espousing different and even opposing worldviews. If they are not, it is a strong indication that at least one of the worldviews, in addition to being speculative, has the structure of philosophical convictions akin to a religion (see section 1A). It immunizes its core creed against outside arguments by a circular chain of assumptions whose every single link supports all the others.

The claims described and appraised in sections 3B-C are speculations well beyond the moderate. Such is, first and foremost, the claim that sex is either irrelevant or reducible to gender, which is a social construct, and that, for that reason, men are made mean to women by nurture rather than by nature and can be tamed by a social upheaval of earthquake proportions. A comparable speculative and/or immoderate claim, made by conservatives, is that gender either is irrelevant or is reducible to sex, because the latter is a natural given. None of these claims can be backed by sufficient scientific evidence, and for that reason, their descriptive parts (the conditions and objects of application) cannot be used as descriptions of the facts that are suitable for legal regulation. What is appropriate is to respond by legally regulating them as

religious, philosophical or other religious-like convictions. They are all entitled the same legal protection as religious convictions.

## Conclusions

If every single individual has human dignity because s/he is not merely a part but also a creator of the universe, it is necessary to find multiple balances between a human, their community and humankind, and between every single instance of them and nature, in conservation as well as in creation. Philosophy and law are two common responses to the challenge. The doctrine of the mean may reconcile them to a degree. Constitutional principles and/or *jus cogens* as the basis for the identification and appraisal of identity claims are of two kinds: historically, the secularization of the modern European state and, dogmatically, international and European human rights principles.

By obligating the vast majority of the population who identify as one sex to identify as a gender, the Istanbul Convention violates the rights to equality and non-discrimination, liberty and security of the person, freedom to hold opinions without interference, freedom of expression and, for some people, freedom of thought, conscience and religion. The claim made by the IC that sex is either irrelevant or reducible to gender, as well as the opposite claim that gender is reducible to sex, is not and cannot be backed by nearly sufficient scientific evidence; it is a speculation of a religious nature. For that reason, descriptive parts of the claims cannot be used descriptions of either condition or consequences of legal regulation.

The IC should be revised accordingly.

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## Split Genders: Medical versus Legal Understanding of Gender Identity (De Lege Lata and De Lege Ferenda)<sup>1</sup>

**Abstract:** For centuries, the law accepted the legal gender of an individual that was indicated at birth by the appearance of their genitalia and stated on their birth certificate. Nowadays, however, we have plenty of scientific, medical and psychological evidence (and thus reasons) to revise the adopted way of thinking about legal gender to associate it more with gender identity. Most people do not perceive a potential conflict between genital sex and gender identity, because their genital sex is consistent with their gender identity. Trans- and intersex community needs recognition of their gender identity independent of their genital sex as a condition for a life of self-determination, personal freedom, respect and dignity; these are, after all, values that are extremely important for the law. The purpose of this analysis is to determine whether the concept of gender identity is perceived generally in the Polish

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language and the Polish legal system in a way that takes into account current medical knowledge and the legitimate needs of the individual. If not, then what *de lege ferenda* recommendations can be made to change this situation?

**Keywords:** ascribed gender, experienced gender, gender identity, legal gender

## Introduction

For centuries, it has been accepted in law that the legal gender of an individual is the gender documented on the birth certificate, determined shortly after birth based on the appearance of the newborn's genitals. Legal gender is thus, in principle, the same as genital sex. Nowadays, however, we have plenty of medical and psychological evidence (and thus reasons) to revise the accepted way of thinking and link legal gender more strongly to gender identity than to genital sex. Most people overlook this issue, because their genital sex and gender identity are consistent. None of us, however, would want to be considered a man while feeling like a woman (or vice versa), but most of us are not threatened with this, because at birth we were recognized as the persons we truly are. A minority of people whose physicality does not comply with their self-identification needs recognition of their gender identity independent of their genital sex as a condition for living a life of self-determination, personal freedom, respect and dignity. All these values are extremely important for the law.

This text will focus on the Polish legal system for three reasons. First, Polish law does not explicitly provide for regulations addressing the protection of gender identity or the reconciliation of legal gender based on it. Second, Polish society is strongly polarized on the issue of recognizing the right of transgender people to live according to their gender identity (PTPA, 2013, p. 230). Third, Poland is generally doing a poor job of protecting transgender minorities (ILGA Europe, 2023, pp. 114–116). The comparative analyses will show that Poland is among the countries whose citizens face a number of serious life impediments in the area analysed here. In doing so, the Polish legal system is an example of an interesting bifurcation. At the regulatory level, it strongly embodies the traditional, 'objective' (genital) approach to human gender, but this view becomes more liberal at the level of the application of the law. This makes the Polish legal system particularly conducive to considerations of whether the law needs the category of gender identity and what the consequences of its absence are. However, in order to conduct such deliberations, it is necessary to first understand what gender identity is, especially given the persistence of stereotypes about this component of mental life. Therefore legal considerations of this aspect must be carried out, taking into account knowledge provided by medicine and psychology.

We have set two goals: to determine whether and how the Polish legal system recognizes an individual's gender identity and to make *de lege ferenda* recommenda-

tions based on the medical and psychological understanding of gender identity and the results of comparative findings. This study is part of the paradigm of the external integration of legal sciences (Opałek, 1968, p. 9; Pietrzykowski, 2012, p. 9). The medical and psychological understanding of gender identity has been presented by specialists in these fields based on a review of the latest literature on the subject. The following methods are used to present the legal understanding of gender identity:

1. formal and dogmatic analysis of legislation and jurisprudence;
2. dictionary analysis (for determining ordinary meanings); and
3. comparative analysis, in order to set Polish regulations against the background of solutions adopted in other countries, for a better understanding of the characteristic features of the Polish approach and to determine the possible directions of its transformation in the future.

## **1. Gender identity in the light of current medical knowledge<sup>2</sup>**

From a medical perspective, human gender is a multifactorial phenomenon, consisting of chromosomal sex, genetic sex, gonadal sex, the sex of internal and external genitalia (genital sex), psychological gender or gender identity, and assigned sex (legal gender) (Bielska-Brodziak & Gawlik, 2016, pp. 9–15). Gender identity (psychological gender, perceived gender or gender identification) is a sense of being a person of a certain gender or multiple genders, or a sense of reluctance or lack of need to define one's identity in terms of gender categories; this is how it is defined in key Polish and international standards of medical care (including Coleman et al., 2022; Gawlik-Starzyk et al., 2024; Grabski et al., 2021).

The latest Polish recommendations for adolescent care introduce a group of substantive and axiological assumptions based on current scientific research:

1. Once formed, gender identity is not subject to volitional change; similarly, the developing gender identity cannot be formed arbitrarily;
2. A person's perceived gender (gender identity) that is incompatible with their genital sex cannot be viewed as a mental disorder *per se*;
3. Affirmation of gender identity and living in accordance with it are an inalienable right of every individual;
4. Attempts to forcibly influence the development of someone's gender identity are not only ineffective, but have negative consequences for the person's health (Gawlik-Starzyk et al., 2024, p. 3).

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2 Under medical knowledge, I also include the observations and conclusions made by psychologists.

The above observations are of particular importance in the case of people whose gender identity is incompatible with their genital sex, and consequently, most often, their legal gender. In this context, the term 'transgender' is used, which is now a collective name for all forms of such non-conformity. Transgender people include those who have developed unambiguously male or female gender identities (trans men and trans women), as well as non-binary people (Grabski et al., 2020, p. 267). The evolution of thinking about transgenderism that has taken place in medical science over the past few decades is telling. It is made apparent by analysing the records of the international medical classifications, the International Statistical Classification of Diseases and Health Problems of the World Health Organization (ICD) and the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association (DSM). The ICD-9 of 1977 placed 'transsexualism' (the term used originally) among sexual disorders and deviations, while in the DSM-3 classification, which dates back to 1980, it was included in the category of gender identity disorders. The subsequent 1980 version of the ICD (ICD-10, p. 180) similarly shifted this term to gender identity disorders. Originally, then, transgenderism (or 'transsexualism') was understood as a disorder, a psychopathology. The first significant changes included the abandonment of the category of 'gender identity disorder' in favour of 'gender dysphoria' (DSM-5, 2013). A fundamental change came with the new 2018 version of the ICD (ICD-11), which discarded the terms 'transsexualism' and 'gender identity disorder', replacing them with the concept of gender incongruence. The latter was excluded from mental disorders and placed in a new group of conditions related to sexual health. Gender incongruence is defined in the ICD-11 as 'a marked and persistent incongruence between an individual's experienced gender and the assigned sex'.

This brief overview reveals some rather surprising facts. Although the phenomenon of transgenderism has been known for centuries, it has only appeared in both scientific research and official medical classifications relatively recently.<sup>3</sup> Since then, however, we can observe an overt, verifiable and rapid evolution of scientific thinking about it, in particular its depsycharitization and the transfer from the area of disorders to the area of norms (Grabski et al., 2020, p. 36). This shift in thinking is not driven by ideological or political considerations but is the result of a scientific consensus, developed on the basis of evidence-based medicine, recognizing gender diversity beyond traditional perceptions of gender.

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3 The first diagnostic units, before the ICD and DSM classifications, were described in the 19th century (Jakubowski, 2015, p. 119).

## **1.1. The etiology of gender identity: The biological background of gender incongruence**

The most current scientific evidence points to a biological rather than volitional origin for gender identity. These views have evolved over the years: in the mid-20th century, the prevailing concept was that gender identity was mainly determined by psychosocial factors, including upbringing. The fallacy of this assumption is demonstrated by numerous unsuccessful attempts to manipulate gender identity, including of intersex people, i.e. those born with atypical external genitalia (Knudson et al., 2020, p. 4; Korpaisarn & Safer, 2019, p. 325). In the past, intersex individuals underwent surgical ‘normalization procedures’ in early childhood to give their genitalia a more typical appearance. As a rule, a procedure with a lower risk of failure was chosen, i.e. feminizing plastic surgery. Although these children were subsequently raised most often in a female gender role, a significant number of them demonstrated a male gender identity upon reaching maturity or reported symptoms of gender dysphoria. Thus nowadays, a belief in the dominant role of psychosocial factors in the development of gender identity is rejected. In turn, the key role is attributed to several interacting factors: genetic factors, exposure to androgens as a foetus and neuro-anatomy (brain structure).

### **1.1.1. Genetic factors**

The involvement of genetic factors in the development of gender identity is indicated by twin studies (Burri et al., 2011, p. e21982; Sasaki et al., 2016, p. 1681). It has been demonstrated that monozygotic twins (having the same genetic material) were congruent in their transgender identity in up to 40% of cases. Such a relationship was not found for dizygotic twins, whose genetic similarity is the same as that of regular siblings (Heylens et al., 2012, p. 752). The data available now suggests there is no single gene that determines gender identity; multiple genes are likely involved in its development (Polderman et al., 2018, p. 97).

### **1.1.2. Exposure to androgens as a foetus**

Another factor shaping gender identity may be the different exposure of the structures of the central nervous system to androgens, i.e. testosterone and hormones with similar activity (commonly known as male hormones), during early foetal development. Excessive androgen production in individuals with the XX karyotype (female chromosomal sex) may predispose the development of a male-like gender identity. In contrast, lack of or insensitivity to androgens in foetuses with the XY karyotype (male chromosomal sex) may result in development of a female gender identity. This mechanism is probably responsible for the incongruent gender identity of some intersex people with underlying hormonal disorders (Babu & Shah, 2021, p. 39). Also, exposure in early foetal development to androgen-lowering drugs

(e.g. certain drugs used to treat epilepsy) has been linked to an increased incidence of gender incongruence (Dessens et al., 1999, p. 31).

### **1.1.3. Neuroanatomy (structure of the brain)**

Studies also indicate a link between brain anatomy and gender identity (Boucher & Chinnah, 2020, p. 91; Kurth et al., 2022, p. 1582; Xerxa et al., 2023, p. e2313139). For example, it was found that the size of the bed nucleus of the stria terminalis, a structure that exhibits gender differences in structure (known as sexual dimorphism), approximates the size characteristic of the sex experienced rather than assigned at birth. These differences occur early in brain development and are probably not a consequence of later hormonal interventions (Kruijver et al., 2000, p. 2034; Zhou et al., 1995, p. 68). Another sex-dependent brain structure whose volume in transgender people is similar to that observed in the experienced gender is the sexually dimorphic nucleus of the hypothalamus (Garcia-Falgueras & Swaab, 2008, p. 3132; Joel et al., 2020, p. 156). There is also data indicating differences in brain structure specific to transgender people, not attributable to one end of the ‘female brain–male brain’ spectrum (Mueller et al., 2021, p. 1122).

## **1.2. The significance of gender identity affirmation for human well-being**

From a psychological perspective, gender identity is one of the basic components of human identity (Steensma et al., 2013, p. 289), through which an individual perceives themselves and functions in society. Being seen in terms of the gender assigned at birth can have a variety of consequences: it can involve a degree of favouritism or, conversely, stigmatization and exclusion. The experiences of transgender people highlight the need for legal protection of gender identity by adapting the legal system to the needs of transgender minorities. The model of minority stress experienced by gender-minority individuals (Testa et al., 2015, p. 67) explains how prejudice-based discrimination and the resulting internalized stigma associated with minority membership translate into negative mental health consequences. The factors described in the model explain the significant disparity in the incidence of mood and anxiety disorders, among others, between trans – and cisgender people, to the disadvantage of the former (Lee et al., 2020, p. 103). Living in a gender role assigned at birth, rather than in accordance with the gender experienced, causes significant suffering (Cole et al., 2000, p. 151) and carries negative mental health consequences (Rotondi et al., 2012, p. 135).

Functioning in accordance with the gender experienced but in disagreement with one’s legal gender forces transgender people to disclose their minority status (indicating that they have a diagnosis included in the mental disorders chapter of the ICD-10 classification). It therefore potentially exposes them to discrimination (and violence) based on their membership in gender minorities as well as in a group of

people with mental disorders (Taylor, 2007, p. 834). Discrimination and violence motivated by prejudice against transgender people can manifest not only at an interpersonal level, but also at an organizational and systemic level; it can result in the loss of jobs, impeded access to education and medical care, and lack of equal treatment by the justice system (Delgado & Castro, 2014, p. 193; Jakubowski, 2017, p. 210).

Using documents that include the gender assigned at birth increases the risk of experiencing deadnaming and misgendering, which adversely affects the mental health of transgender people (Russell et al., 2018, p. 503). Having documents with unadjusted data is associated with higher levels of psychological distress and suicidality (Scheim et al., 2020, p. e196). Adjusted data, in turn, can promote higher earnings, engaging in health-seeking behaviours and less discrimination from the family, among other things (Hill et al., 2018, p. 25), which is conducive to improving the mental state of trans people (Drescher et al., 2019, p. 52). The legal adjustment of gender designation in Poland can, in its current form, negatively affect the well-being of transgender people in many ways (Grabski et al., 2020, p. 73). Having to sue parents in court can contribute to a deterioration in family relationships, although family support is a key factor affecting the well-being of transgender people (Simons et al., 2013, p. 791).

### **1.3. Recapitulation before reflections on language and law**

To summarize, it is important to highlight some basic conclusions. First, there is now a preponderance of evidence for the predominant biological etiology of gender incongruence (including transgenderism) and thus the biological basis of gender identity itself. Despite this, there is no imaging or genetic or laboratory test that can be used to ‘confirm’ gender identity. In most cases, it is also not possible to assess the hormonal environment in which the sex (including gender identity) of the foetus is formed. Hence a person with gender incongruence may not present any of the identified biological markers of transsexuality (Knudson et al., 2020, p. 3). Second, gender identity, as biologically determined, is not a matter of choice, much less a matter of whim, caprice, etc. There is no justification for dividing sex determinants into those that are biological (the appearance of genitals), ‘objective’, certain and given once and for all, and those that are ‘non-biological’ (gender identity), which are ‘subjective’, uncertain and subject to arbitrary changes. Gender identity is also a biological determinant and is not subject to arbitrary change. Third, gender identity is one of the basic categories of human identity, which organizes the way an individual sees themselves, the way they navigate social reality and the way they are perceived by others. Studies have shown that extending legal protection to it promotes improved psychological well-being (Du Bois et al., 2018, p. 220), and the inability to affirm one’s gender identity can be a source of suffering. In such a context of current medical knowledge,

I will look at the perception of gender identity in the Polish language generally and in the Polish legal system.

## **2. Gender identity in the general Polish language**

Before analysing the relevant legislation and jurisprudence, it should be pointed out that gender identity does not have a legal definition in Poland. This leads to the conclusion that a lawyer can understand it either in the specialized way outlined above or must resort to general language. In turn, a representative source of knowledge about the general language is dictionaries (Bielska-Brodziak & Tobor, 2007; Tobor et al., 2008). Therefore, using a selection of 25 dictionaries from 1983 to 2023, I will determine how ‘gender identity’ and closely associated expressions, i.e. ‘identity’, ‘sex’ and ‘gender’, are understood in modern Polish.

### **2.1. Tożsamość płciowa**

None of the modern dictionaries of the Polish language includes either the term *tożsamość płciowa* (gender identity) or *identyfikacja płciowa* (gender identification). Moreover, although dictionaries note the broader categories of *tożsamość* (identity) and *identyfikacja* (identification), none of the descriptions of these categories refer to gender identity or identification. These are terms that are still too rarely present in actual utterances, and thus also in the consciousness of language users, to be included in dictionaries. Dictionaries of European languages such as English, French and Spanish present a different picture; they include the expression for *tożsamość płciowa* – *gender identity* (*Cambridge dictionary* (Cambridge University Press, n.d.)), *identité de genre* (*Dictionnaire de français* (Larousse, n.d.)), *identidad de género* (*El Diccionario de la lengua española* (Real Academia Española, n.d.)) – and define it in a way that is close to its medical-psychological understanding.

### **2.2. Tożsamość**

*Tożsamość* (identity) in Polish dictionaries refers both to an individual and a group. On an individual level, it is understood as an awareness of oneself, one’s qualities and one’s distinctiveness, or as the totality of characteristics that identify a person (Bralczyk, 2005, p. 853; Drabik et al., 2008, p. 1048; Dubisz, 2003, p. 96; Polański, 2008, p. 836; Żmigrodzki et al., 2023). The first meaning has appeared in dictionaries only since the beginning of the 21st century, emphasizing the internal perspective of the subject. The second, much older, one, on the other hand, assumes an external perspective, focusing on what allows others to identify the person. In the case of people experiencing a conflict between genital sex and gender identity, the choice of either of the above-mentioned understandings of *tożsamość* will clearly lead to completely different intuitions about the determinants of gender – whether it is the sense of experienced gender (awareness of oneself, one’s characteristics and one’s dis-

tinctiveness) or the appearance of external genitalia (the totality of features that allow the identification of a person).

### 2.3. Płeć

*Płeć* (sex) is defined in dictionaries as ‘the totality of characteristics that make it possible to distinguish women from men’ or as ‘a set of properties that characterize the organisms of male and female individuals and oppose them to each other’ (Żmigrodzki et al., 2023). Therefore both of these understandings emphasize the external perspective: the observer should be able to distinguish between a woman and a man based on their distinctive external characteristics. There is no room for an internal perspective, experiencing oneself as a particular person. It should be noted that in Polish, there is only the term *płeć*; in contrast, in languages such as English, French and Spanish, there are pairs: *sex-gender*, *sexe-genre*, *sexo-genero*. Therefore already at the level of general language, the phenomenon of *płeć* does not distinguish the nuances between the external and internal dimensions, thus reducing it to what is external.

### 2.4. Gender

Polish dictionaries have recently noted the term ‘gender’, which can be understood in two ways. First, it is understood as ‘a current in contemporary humanistic reflection based on the belief that human gender identity is a phenomenon shaped socially and culturally’ (Żmigrodzki et al., 2023). Second, gender is ‘a person’s gender identity understood as a phenomenon shaped socially and culturally’ (Żmigrodzki et al., 2023); the notion that gender identity is something learned, acquired from the outside, is clearly visible here.

Two important insights can be seen here: in general Polish, ‘gender identity’ has been merged with ‘gender’, and the word has become a symbol of a hostile ideology that threatens the foundations of the social order.<sup>4</sup> Thus ‘gender identity’ inherits the burdens of ‘gender’, with much less association with the achievements of medicine and psychology. Let us note again that gender identity, according to current medical knowledge, is not shaped culturally and socially; it is a human property with a biological basis. This fundamentally changes the situation, because it brings the etiology of gender identity closer to uncontrollable human traits, rather than to preferences that are subject to fairly free changes.

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4 In 2020 (in the 9th term of the Sejm), a citizens’ bill was submitted entitled ‘Tak dla rodziny, nie dla gender’ (Yes to family, no to gender). It concerned consent to denunciation of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, drawn up in Istanbul on 11 May 2011. ‘Gender’ appears in the bill’s explanatory memorandum: ‘The key reason why the [...] convention has been met with [...] opposition is its introduction into Polish law of the gender category of “socio-cultural gender”, assuming the contractual nature of differences between genders’ (Sejm Rzeczypospolitej Polskiej, 2020).

### **3. Gender identity in Polish legislation and judicature**

#### **3.1. Gender identity in applicable legislation**

Gender identity appears expressly in Polish legislation only once, in Article 47 of the Act of 13 June 2003 on Granting Protection to Foreigners on the Territory of the Republic of Poland. This provision establishes a special procedure in international protection cases if the applicant is persecuted on the basis of gender, sexual orientation, gender identity or age.<sup>5</sup> It is more common to find the term *tożsamość* in Polish legislation, with other words complementing it, such as the identity of the Polish nation, religious identity, cultural identity or national identity. These are different types of collective identities, the first three of which are already mentioned in the Constitution (Articles 6(1) and 35(2) of the Constitution of the Republic of Poland, 1997), while national identity is mentioned in the preamble to the Pole's Card Act of 7 September 2007. Interestingly, despite the fact that these are collective identities, this is where the legislatures use the concept of identity to emphasize the internal perspective of the subject: national, religious or cultural identity are phenomena experienced internally by the individual. The expression *tożsamość* in relation to an individual is also used in several laws.<sup>6</sup> In principle, it is consistent with the dictionary definition of identity cited above – but the ‘external’ one, understood as the totality of characteristics that make it possible to identify a person.

#### **3.2. Gender identity in judicial decisions: Gender reconciliation procedures**

Jurisprudence seeks to ‘patch up’ the legal system’s deficiencies by introducing the category of gender identity , as an important factor in the identity of the subject, into the justifications of judgments. First, jurisprudence defines it for the purposes of legal language and has also ‘created’ the Polish procedure for reconciling the gender entered on the birth certificate with gender identity – in a way in place of the legislature .

Regarding the former, courts accept that gender identity is ‘the deeply felt internal and individual experience of social gender, which does not have to correspond to the gender determined at birth, including personal feelings of one’s own corporeality and other expressions of one’s gender’ (Judgment of the Regional Court in Warsaw, 2020; also see: judgment of the Supreme Court of Poland 2022). The jurisprudence emphasizes the subjectivity in feeling a certain identity: it is a matter of the individual ‘feeling’ of a person (Judgment of the Province Administrative Court in Łódź,

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5 In addition, the term *tożsamość płciowa* is used in the annex to the regulation on the core curriculum of the subject ‘Family, Life, Education’ (Regulation on the Core Curriculum of Pre-School Education and General Education in the Respective Types of Schools 2012).

6 See, for example, Article 4(1) of the Act on Identity Cards 2010, Article 3(19) of the Act on Safety of Mass Events 2009, or Article 12(3) of the Act on the Family Capital 2021.

2017). It is a well-established view that gender identity constitutes an individual's personal interest as a special area of intimate life and the human psyche (Judgment of the Court of Appeal in Rzeszów, 2009; Judgment of the District Court in Warsaw, 2017; Order of the Supreme Court, 1991).

The judicature has also developed a procedure for changing the sex in a birth certificate, and it is in these judgments that the term 'gender identity' is present most frequently. The term *uzgodnienie płci* (gender reconciliation) has been criticized for pointing to the possibility of changing a person's sex, while the purpose of the procedure is to reconcile the flawed legal condition with the factual condition of a person's gender identity. The procedure currently in use in Poland is not designed for this type of case; its basis is Article 189 of the Code of Civil Procedure (1964), on a very general action for determination. Courts use it by analogy for gender reconciliation processes, because the procedure that would clearly address that important issue has never been specified or regulated in Poland in any legislation. Proceedings are held in a litigation procedure, which requires the identification of the defendant (in practice – the parents of the person whose gender is being affirmed). What is difficult to accept is that someone is forced to claim such a personal right through conflict; the problem becomes even more serious when a transgender person is not accepted by their parents. When parents accept the claim, it facilitates the proceedings to a great extent. However, there are situations in which parents request that the action be dismissed, e.g. because 'they cannot allow this request due to emotional feelings relating to the fact that a son and not a daughter was born' and they believe that the action is a manifestation of a 'whim [or] fancy' (Judgment of the Court of Appeal in Białystok, 2016; also see: judgment of the Regional Court in Słupsk, 2017).

While the Polish legislation is silent, the courts have introduced in their rulings explicit references to medical knowledge: gender reconciliation requires special knowledge and cannot be based solely on the testimonies and statements of the parties (Judgment of the Court of Appeal in Białystok, 2016; Judgment of the Court of Appeal in Rzeszów, 2009). The courts, in lieu of the legislature, formulate the necessary conditions for the gender reconciliation procedure: contact of the person with specialist physicians, diagnosis, start of hormone therapy, a lawsuit with experts and change in the birth certificate, possibly further medical affirmative treatments (Judgment of the Court of Appeal in Białystok, 2016). Only after a diagnosis has been made and hormone therapy has started is it possible to bring a lawsuit, and the basic evidence in the case is the opinion (diagnosis) of the physician-sexologist and the testimony of the plaintiff.

In gender reconciliation processes, gender identity is a visible category, as it is the basis for reconciliation. However, it appears only in contrast to genital sex, and in the Polish normative system it does not constitute a value in itself. Courts make gender identity the criterion determining legal gender, only taking precedence in cases of conflict with genital sex. This is also supported by the fact that gender reconciliation

lawsuits do not require a transgender person to undergo either prior or subsequent surgical intervention that would alter the external perspective, i.e. the appearance of the genitals. However, gender identity is anyway evaluated in a way that seeks to strongly and externally ‘objectify’ this criterion, which is related to the law’s general caution towards declarations made by an individual interested in undergoing gender reconciliation. This distrust in itself can be a traumatizing experience for a transgender person (cf. Bielska-Brodziak & Boratyńska, 2019, pp. 542–559). By recognizing the serious shortcomings of the current solution, courts indicate the need for legislative activity: ‘it is the legislature’s responsibility to consider whether the current state of the law corresponds to the contemporary level of knowledge about gender identity and international standards for recognizing gender identity as the official basis for gender determination. It is also up to the legislature to exhaustively define the legal consequences of a court decision on gender reconciliation’ (Order of the Supreme Court, 2014).

### **3.3. Gender identity in the vetoed Gender Recognition Act**

In 2015, the Polish parliament passed the Gender Recognition Act (Sejm Rzeczypospolitej Polskiej, 2015), which was then effectively vetoed by the president. This piece of legislation was the result of years of work by the activist, legal and medical communities; their representatives took an active part in the legislative process. Importantly, the act introduced a legal definition of gender identity, clearly embedded within the medical context: ‘Whenever the act refers to gender identity, it should be understood as the established, intensely felt experience of one’s gender, which corresponds, or does not correspond, to the sex entered on the birth certificate’ (Article 2(1)). The definition stressed the importance of a person’s internal experience of gender identity, rather than the identification of a person from the outside.

The 2015 Act stipulated that gender reconciliation would take place in a non-contentious procedure before a court specializing in such cases. An unmarried person who finds they have a gender identity different from the gender entered on their birth certificate can apply for gender reconciliation (the application had to be accompanied by two medical certificates confirming this). The request for gender reconciliation was subject to quick review (three months from the date of filing), and the court could limit the proceedings to evidence in the form of documents attached to the application and hearing the testimony of the applicant. The Act thus provided for a significant reduction in formality and for empowerment of the applicant. The participation of the ‘other party’ (parents) was not required. Perhaps, more than nine years after this bill was adopted by the Polish parliament and vetoed by the president, this solution could be revised in light of contemporary legislative directions in Europe, which will be discussed next.

#### **4. Gender identity in international law and other legal systems**

Gender identity is a category present in acts of international law, where the need to protect it and to combat transphobia is emphasized.<sup>7</sup> The Yogyakarta Principles (2006) (soft law) define gender identity very broadly, as the deeply felt internal and individual experience of social gender, which may or may not correspond to the gender determined at birth, including personal feelings of one's own corporeality (which may lead to modification of external appearance or biological functions by medical, surgical or other methods) and other expressions of one's sexuality through clothing, speech or behaviour.

The interpretation of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms plays an important role in shaping the international understanding of 'gender identity'. This provision states that '[e]veryone has the right to respect for his private and family life, his home and his correspondence'. The European Court of Human Rights has repeatedly indicated in its decisions that the expression 'private life' includes an individual's gender identity, first name, sexual orientation and sex life (judgments of the ECHR, 2001, 2016 and 2017). In 2002, a landmark judgment was made to protect an individual's gender identity in the case of *Goodwin v. the United Kingdom*; in finding a violation of Article 8, the Court pointed out:

It must also be recognised that serious interference with private life can arise where the state of domestic law conflicts with an important aspect of personal identity. The stress and alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by law which refuses to recognise the change of gender cannot be regarded as a minor inconvenience arising from a formality. A conflict between social reality and law arises which places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety. (Judgment of the ECHR, 2002)

Thirteen years later, in its decision in *Y.Y. v. Turkey*, the Court emphasized that 'the right of transgender persons to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter

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<sup>7</sup> For example, Article 4(3) of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (2011); Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime and Replacing Council Framework Decision 2001/220/; Regulation (EU) 2021/692 of the European Parliament and of the Council of 28 April 2021 Establishing the Citizens, Equality, Rights and Values Programme and Repealing Regulation (EU) No. 1381/2013 of the European Parliament and of the Council and Council Regulation (EU) no. 390/2014.

of controversy requiring the lapse of time to cast clearer light on the issues involved' (Judgment of the ECHR, 2015). In this decision, the Court also highlighted the limitations on the freedom of states to regulate gender reconciliation, because 'where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted' (Judgment of the ECHR, 2015; similarly Judgment of the ECHR, 2018).

Also relevant to this discussion are the solutions to legal gender reconciliation adopted by other European countries. A duality of approach can be noted here: progressive countries that have implemented the standards of international law quoted above (such as Spain, Germany and Malta) and countries with legal systems as mal-adjusted as in Poland (such as Hungary and the Czech Republic). In May 2020, the Hungarian parliament amended the existing civil records law with a two-thirds' majority: the previous 'sex' column on birth certificates was replaced with a 'sex at birth' column. While previously the law allowed people to apply for a change in the sex indicated on their birth certificate based on an administrative procedure set forth in a ministerial decree, currently there is no such possibility. Reconciliation of birth-certificate sex with gender identity is not possible even if the transgender person has undergone surgical sex correction (Łukasiewicz, 2021, pp. 91–92). This solution appears to be one of the most radical in Europe.

In the Czech Republic, legal gender reconciliation is very difficult. The application is examined by an expert commission at the Ministry of Health, which consists of a sexologist, a psychiatrist, a medical expert hired by the ministry, a clinical psychologist, an endocrinologist, a gynaecologist and a lawyer specializing in medical law. Before an application is filed, a transgender person must function in the opposite gender for a period of one year, and appropriate hormone therapy is given to them for another year. As a result, after two years, it becomes possible to submit an application; if it is accepted, the commission will issue an opinion qualifying the transgender person for surgical sex correction. Only after this has been performed, and after sterilization, is it possible to introduce a change in the birth certificate. In May 2024, the Czech Constitutional Court ruled that surgery cannot be a condition of formal sex change (Judgment of the Constitutional Court, 2024). This decision is seen as a landmark, and indications are that new regulations could be in place by 2025.

However, in many European countries, legal solutions have been developed to provide high-level protection to transgender people (including in France, Denmark, the Netherlands, Germany, Spain and Malta). We will discuss the latter three countries, which are also interesting because of the legislative evolution they have made towards liberalizing the gender reconciliation procedure, moving away from the need for medical 'verification' to give more agency to the will of the individual.

In Spain, the issue of legal gender reassignment was regulated in the 2007 Act on Gender Rectification in the Register (the so-called *Ley trans* (Gobierno de España, 2007)). An adult could apply for a legal gender reconciliation, including changing

their full name to match the new gender entered in their birth certificate. As the law stood in 2007, it was necessary to present a medical certificate stating gender dysphoria and undergo at least two years of hormone therapy. It was not necessary to dissolve an existing marriage (same-sex marriage is possible in Spain) or to undergo surgical procedures to adjust a person's appearance to the experienced sex (such as hormone therapy or surgical sex correction), including sterilization. On 2 March 2023, the Ley para la igualdad real y efectiva de las personas trans y para la garantía de los derechos de las personas LGTBI (Gobierno de España, 2023) went into effect, an act liberalizing the status quo. Gender identity (*identidad sexual*) is henceforth framed as 'the internal and individual experience of gender as each person feels and defines it, possibly, but not necessarily, corresponding to the sex assigned at birth' (Article 3(1)). Legal definitions of the terms 'gender expression' (the way each person expresses their gender identity) and 'transgender person' were also introduced.

Under the new solutions, any person who wishes to change their legal gender may apply for a correction of the entry in the registry (Article 43(1)); all they have to do is make a statement, and there is no longer a need to present medical documents. The age limit has also changed: a change in the sex entered in the birth certificate can be made by a person who is 16 years of age or older, while those between 14 and 16 years of age must submit the consent of their legal guardians. Under the age of 14, court approval is required for the change.

In Malta, the first gender reassignment procedures were regulated through an amendment to the Civil Code in 2004. These provisions were repealed in 2015 and replaced by the Gender Identity, Gender Expression and Sex Characteristics Act (Legiżlazzjoni Malta, 2015). The Act includes legal definitions of several key terms related to gender (Article 2), namely gender identity, gender expression, gender marker, lived gender and sex characteristics. For all Maltese citizens, the act affirmed the right to recognition of gender identity, the free development of the individual in accordance with their gender identity, the right to be identified in a manner consistent with one's identity in documents and the protection of bodily integrity and physical autonomy (Article 3). A person 16 years of age or older can make a statement to a notary public, which is then entered in a public registry. On this basis, the head of the registry approves changes to the birth certificate, which then paves the way for amending other documents.

The Spanish and Maltese procedures are interesting examples, and not only because of the way they deformalize the process. These laws determine the widespread implementation of specialized (medical) terminology into legal language, thus expanding the linguistic picture of the world and influencing the presence of this terminology with the desired defined meaning, in legal language, the language of the law and, as a result, in general language as well.

In Germany, the issue of gender reconciliation was regulated by the 1980 Act on Name Change and Gender Determination in Legitimate Cases (*Transsexuellengesetz*)

(Bundesministerium der Justiz, 1980). The Act distinguished two procedural modes: a mode for the ‘small’ procedure of gender reconciliation (*kleine Lösung*), consisting of a change of first name on the birth certificate; and a mode of the ‘large’ procedure of gender reconciliation (*große Lösung*) that allows a transgender person to make a full change of sex, entered in the birth certificate. Both modes were present before courts, with the necessary element for the second mode being the submission of opinions of two court-appointed physicians specializing in transgenderism, acting independently of each other. The prerequisites for the ‘large’ procedure were feeling a lack of belonging to the sex entered in the birth certificate, at least three years of the desire to assume the experienced gender and a high probability that the feeling of belonging to another gender will not change in the future. Initially, the requirement for the ‘large’ procedure also included a permanent inability to procreate and undergoing a surgical procedure that altered external sexual characteristics, clearly approximating their appearance to the experienced gender (§ 8(3) and (4)). This provision was declared unconstitutional (2011) and has not been applied since. Earlier, the Federal Constitutional Court (2008) had ruled that the requirement for divorce is in conflict with the right to protection of personal life and the right to protection of a previously contracted marriage.

In April 2024, the German Bundestag passed the Self-Determination Act (*Selbstbestimmungsgesetz*), which has not yet come into force.<sup>8</sup> The very name of the Act emphasizes the change in favour of expanding the autonomy and subjectivity of trans people so that they can exercise their rights in accordance with their identity and without hindrance. It will be possible to change the sex entered in the birth certificate by making a declaration at a registry office, and it will no longer be necessary to have proceedings before a court or to submit two medical reports. The new proposed Act also does not include regulations for medical gender adjustment. The German example is important for showing the direction of evolution that has explicitly linked gender reconciliation to the concept of self-determination, a direction that affirms the fundamental influence of gender identity in determining a person’s sex and shifts the emphasis from appearance of the body to a person’s self-identification.

## Conclusions

The objectives of this study were (1) to determine whether and how the Polish legal system recognizes an individual’s gender identity, and (2) to make *de lege ferenda* recommendations based on the medical and psychological understanding of gender identity and the results of comparative findings. Below, We will summarize the anal-

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<sup>8</sup> The Act will come into force in two stages: as of 1 August 2024, it will be possible to apply for a declaration of gender and first-name change, while on 1 November 2024, the Self-Determination Act will finally replace the Transsexuals Act of 1980.

yses on the understanding of gender identity and at the same time present *de lege ferenda* conclusions.

First, gender identity is a category present in research discourse and seen as an important component of human life. The prevailing position in medical sciences is that gender identity is biologically determined, although it cannot be easily determined by the tests currently available. Gender identity is as much a ‘biological’, ‘objective’ and not easily changed determinant of a person’s gender as the appearance of the external genitalia. However, it has a much greater impact on the overall life of the individual, so the need to renounce it in society and the lack of recognition of the right to live in accordance with one’s gender identity have a destructive effect on the psychological well-being of the individual. Legal gender is, in turn, a formal category; its understanding in law can and should change with changes in the understanding of the world and reliable knowledge about it. It is precisely for these reasons that the semantic content of *płeć prawa* should turn towards gender identity.

Second, the law splits gender from gender identity. Gender in law and gender in medicine and psychology are also split categories. As a result, legal gender in Poland is identified with a person’s physical appearance rather than their self-identification. Gender identity is not seen as the most important criterion determining gender, as current medical and psychological knowledge shows.

Third, the Polish legal system does not explicitly recognize gender identity at all; the concept is absent from current legislation. The term *tożsamość płciowa* (gender identity) has not yet spread in general Polish language, while it is present in other European languages (such as English, French or Spanish). This situation shows well that gender identity is a term that is not very present in social consciousness, which is reflected in and co-created by language (cf. Bartmiński, 2012). The dictionary entry that is relatively close to gender identity is ‘gender’, most often used in Poland as an expression for a hostile ideology that threatens the traditional order. This is expressed, for example, in the title of the citizens’ bill: ‘Yes to family, no to gender’.

A dictionary analysis of the word *płeć*, on the other hand, shows that it is understood in general Polish language mainly from the perspective of criteria that are external and thus considered objective. A better-embedded concept, however, is *tożsamość* (identity), one of the meanings of which focuses on what is internal to a person. This lays the groundwork for the construction of a universally understood concept of *tożsamość płciowa*, corresponding to the medical and psychological knowledge about it (on these perspectives, see Walkiewicz, 2022, pp. 86–87).

Polish legislation also does not use the term *tożsamość płciowa*. The law explicitly addresses various types of identity, mostly collective ones, but does not explicitly address gender identity. Thus the average addressee of the law is not aware that gender identity is an important legal criterion; it is hidden as irrelevant and subjective. A way to free the legal system from the inadequacy of general language over specialized knowledge could be to follow in the footsteps of other legislations – such as the

Maltese or Spanish – and establish legal definitions as binding understandings of the words in question.

Fourth, it is of course impossible to dispute the fact that the practice of sex assignment based on the appearance of external genitalia is the cheapest, simplest method and, moreover, usually leads to a correct result. However, the problem is deeper, because genital sex is not only used to establish *prima facie* gender. In practice, this is the basis of a very strong presumption, which in Poland can only be refuted in court. However, judicial gender reconciliation has not been established directly by the legislature; it is a solution resulting from jurisprudence and based on a legal basis that is unsuited to the specifics of this type of case. When the conflict is real, when parents do not accept their child's needs, the process can have a traumatizing effect on the transgender person.

Fifth, although gender identity is a present and relevant category in Polish jurisprudence (as the basis for gender reconciliation), it must be said that it is not viewed in accordance with current medical knowledge. An individual's experience of themselves is usually seen as a subjective state, not an objective one; the internal experience requires objectification from the outside. For recognition of gender identity, at this stage of legal reflection strong medical evidence (medical opinions) is needed, provided during the gender reconciliation process. A person's gender identity is not a category that the law trusts; the law requires strong proof. The above-cited Spanish and Maltese solutions are characterized by trust of the individual, which undoubtedly enhances the well-being of transgender people. In the countries that recognize the authority of medical science and psychology on the issue of gender identity, there is a clear trend towards making the burden of proving gender identity smaller, as evidenced by the rejection of the former requirement for surgical intervention, or the evolution of German law towards placing the decision in the hands of the citizen to decide for themselves.

As Małgorzata Bieńkowska writes, the experience of transgender people is marked by 'a kind of discontinuity' (2012, p. 81). The Polish legal system exacerbates the uncertainty of their situation. In view of the conflict and divisions around the concepts of gender and gender identity, Polish law is incapable of producing its own categories and meanings but focuses on eclecticism. On the one hand, it does not seem to take gender identity into account in any way, and on the other hand it does not destroy the peculiar 'prostheses' in the form of the current procedure for reconciling legal gender with gender identity which has been developed in jurisprudence. This eclecticism, compared to the Hungarian or Czech solutions, is, of course, a certain 'blessing in disguise' for transgender people, but it still encumbers them with a burden of anxiety, in that their gender identity is exposed to public judgement and has to be proven.

One's identity makes one think about the definition of oneself (who am I?); this simple question about self-definition is always difficult. Transgender people expe-

rience dual difficulties: 'If these people navigate the binary gender system, they are forced, at least in part, to define themselves according to how their environment perceives them. On the other hand, they have a constant sense of the inadequacy of such a definition of themselves' (Bieńkowska, 2012, pp. 81–82). This perspective – searching, waiting, confirming – is well reflected in the words of Urszula Werkowska's letter to MPs in connection with the submission of the 2015 gender reconciliation bill:

[T]he current legal system has taken me away from the very important work of rationally building my desired cohesive female personality. It was a time to focus on pondering: Will the court believe me? Do I meet the appropriate standards of femininity as defined by the legal institution? What does the court understand by the term woman? [...] As a result of this disturbed atmosphere for several years, full of pressure, after obtaining a judgment that was positive for me, I needed another several years to achieve the femininity that was balanced and natural for my own ego. The court battle for my happiness, dragging on (from the filing of the lawsuit to the final judgment) for as long as two years, made it much more difficult for me to build my natural female identity in the social sphere [...] The next several years were spent distancing myself from the artificially fuelled, overexaggerated female identity, forever proving my femininity for the court. (Quoted in Dębińska, 2020, p. 207)

Even if the law ultimately recognizes the experience that is most deeply accessible to the individual, it starts from a position of distrust towards it and at the same time challenges and interferes with what the individual has discovered in themselves: the knowledge and feeling that change everything. The law does not trust gender identity, but also emphatically reveals transgenderism, exposing this piece of an individual's identity to a public test, or one might even say a so-called 'real-life test' (Dębińska, 2020, p. 205).

Sixth, *de lege ferenda*, the law should treat gender identity with more trust, justified precisely by the grounds provided by current medical and psychological knowledge. In particular, a statutory regulation is needed that should lead to the abandonment of court proceedings, either in favour of non-contentious proceedings or an administrative procedure. In this regard, the Polish legislature has the opportunity to draw, for example, from the models cited in this text.

Seventh, statutory provisions should specify a legal definition of gender identity, which will help embed the concept more firmly in legal discourse but will also affect general Polish language. Thus a legal definition can indirectly have a positive effect on public perceptions of the right to live in accordance with one's gender identity. The relationship between legal language and general language is admittedly asymmetrical (legal language draws more from general language than vice versa) but not one-sided. Law can also affect everyday Polish language and thus the awareness of its users.

The introduction of a legal definition of gender identity will allow genital sex to cease to be the sole determinant of legal gender. Two clear criteria for determining a person's legal gender will appear in the system, and in the event of a conflict

between them, resulting from gender mismatch (rather than, for example, mental illness), the identity criterion will obviously take priority. This will promote the protection of self-determination and the freedom of an individual.

We will not suggest here a withdrawal from the traditional method of determining legal gender based on the appearance of the external genitalia, because in the vast majority of cases there is no conflict between genital sex and gender identity. However, since these situations of conflict do occur, then in respecting human dignity and the right to life, the system must also recognize an individual's right to live according to their gender identity. The presumption of conformity of gender aspects must therefore be able to be rebutted in a way that values the individual's identity to the greatest extent possible and protects them from experiencing harm due to a flawed presumption based on the genital sex.

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## Cultural Moral Evolution: A Proposed Model and Application in a Review and Analysis of the Evolutionary Stages of Diverse Cultures and the Impact on the Emergence and Identification of LGBTQA+ Communities

**Abstract:** The authors present a five-part initial examination of cultural moral evolution in several diverse cultures, looking specifically at attitudes towards LGBTQA+ communities and scrutinizing how societal attitudes shift from fear, animus, tolerance, and acceptance to integration. This evolution is gauged through various societal lenses, including laws, religion, human rights, and educational practices. In Part One, the authors discuss the concept of cultural moral evolution and how it differs from and shares some of the same traits as cultural anthropology. Part Two explores cultural moral evolution towards LGBTQA+ communities in three countries: Malaysia, the Netherlands, and Saudi Arabia. Part Three extends this analysis to four US states – Florida, Alaska, Hawaii, and Colorado. Part Four focuses on the US military, particularly the US Navy, analysing its cultural moral evolution towards the LGBTQA+ community. Finally, these observations are synthesized, with a summary of how the cultural moral evolution model is applied across different societal segments.

**Keywords:** acceptance, cultural moral evolution, integration, LGBTQA+ communities, tolerance

## Introduction

This article presents a five-part initial examination of cultural moral evolution in several diverse cultures, looking specifically at attitudes towards LGBTQA+ communities and scrutinizing how societal attitudes shift from fear, animus, tolerance, and acceptance to integration. This evolution is gauged through various societal lenses, including laws, religion, human rights, and educational practices. In Part One, we discuss the concept of cultural moral evolution and how it differs from and shares some of the same traits as cultural anthropology. Once a working definition of cultural moral evolution has been established, the stages of the evolution are identified, as neutral, apprehension, fear, anger, acrimony, acceptance, integration, and belonging, and each one is defined. Cultural markers are identified within each stage; for this proposed model, they are law, religion, human rights, and education.

Part Two explores cultural moral evolution towards LGBTQA+ communities in three distinct countries: Malaysia, the Netherlands, and Saudi Arabia. This section hinges on a historical analysis of each country's legal, religious, human rights, and educational institutions, especially noting their evolution over time. This historical perspective is then juxtaposed with key LGBTQA+ milestones within these countries, such as the establishment or abolition of relevant laws, religious practices, human rights, and academic dynamics.

Part Three extends this analysis to four US states – Florida, Alaska, Hawaii, and Colorado. Employing similar historical markers, we assess each state's stage of cultural moral evolution with its LGBTQA+ community. Comparisons are drawn based on factors such as the legislative intent behind laws that either support or oppose LGBTQA+ recognition and acceptance, offering insights into the moral progression or regression within these states.

Part Four focuses on the US military, specifically the US Navy, analysing its cultural moral evolution towards the LGBTQA+ community. This analysis also includes brief comparisons with other military branches to highlight similar or divergent patterns in their respective evolutionary stages. Finally, these observations are synthesized, with a summary of how the cultural moral evolution model is applied across different societal segments. This part emphasizes the significance of this model in pinpointing the current evolutionary stage regarding LGBTQA+ acceptance and integration. This section serves as a crucial capstone, underlining the broader implications of the paper and their relevance in understanding and fostering a more inclusive society.

## 1. Cultural moral evolution

### 1.1. Introduction

To provide a working model for cultural moral evolution (a conceptual framework), it is necessary to describe the stages through which a dominant culture interacts with and adapts to an emerging or marginalized subculture. This model delineates a suggested progression from indifference or ignorance (the neutral stage) to eventual acceptance and integration, and possibly to a deep sense of belonging. Each stage – neutral, apprehension, fear, anger, acrimony, acceptance, integration, and belonging – represents a shift in attitudes, policies, and interactions between the dominant culture and the subculture. This model is instrumental in understanding how cultural perceptions and interactions evolve over time within a societal context.

The definition of cultural moral evolution in this context differs greatly from what most understand as cultural anthropology, despite shared markers. Each is a dynamic process with an ultimate goal of adaptation, but process and timing create different paths to different adaptation. A brief comparison of cultural moral evolution and cultural anthropology will enhance understanding of the proposed working model.

#### *Cultural moral evolution:*

- Focus: This model, as conceptualized, primarily addresses how a dominant culture's perceptions and attitudes evolve in response to an emerging or marginalized subculture. It is structured into stages such as neutral, apprehension, fear, anger, acrimony, acceptance, integration, and belonging (Kottak, 2013).
- Approach: The model is theoretical, offering a generalized view of cultural adaptation and acceptance processes, recognizing the complexity of real-world interactions (Hofstede, 1980).
- Purpose: Its primary use is to understand societal shifts in attitudes and policies towards different cultural groups, focusing on moral and ethical evolution within societies (Tylor, 2010).
- Limitation: The model's generalization is both its strength and its limitation, as it may not always capture the unique nuances of each cultural interaction (Geertz & Darnton, 1973).

#### *Cultural anthropology:*

- Focus: Cultural anthropology explores the diversity of human cultures, studying norms, values, practices, rituals, language, religion, and social structures across societies (Boas, 1940).

- Approach: It employs qualitative methods like ethnography and participant observation, requiring extensive fieldwork for deep cultural immersion (Malinowski, 1922).
- Purpose: The goal is to understand and appreciate cultural diversity, exploring how various cultures function and the meanings behind their practices (Herskovits, 1955).
- Limitation: While it provides rich, detailed cultural insights, cultural anthropology can struggle with generalizing findings to broader contexts (Mead, 1935).

The cultural moral evolution model and cultural anthropology differ in several key aspects. In terms of scope, the cultural moral evolution model is more focused on the dynamics between the dominant culture and subcultures, while cultural anthropology examines all facets of human cultures more broadly. Methodologically, the cultural moral evolution model tends to be largely theoretical and follows a staged approach, in contrast to cultural anthropology, which is grounded in empirical, qualitative research methods. Regarding purpose and application, the cultural moral evolution model is primarily aimed at understanding and influencing policy and societal attitudes. On the other hand, cultural anthropology is dedicated to providing a comprehensive understanding of cultural practices and values. Finally, in terms of flexibility and adaptability, cultural anthropology's ethnographic approach allows for a more flexible and nuanced understanding of cultures. This stands in contrast to the more rigid, stage-based approach of the cultural moral evolution model. While both cultural moral evolution and cultural anthropology aim to understand cultural dynamics, they differ in scope, methodology, and application. The cultural moral evolution model provides a structured framework for understanding how societies adapt to cultural diversity, primarily from a moral and ethical standpoint. In contrast, cultural anthropology offers a broader, more detailed exploration of cultural practices and beliefs, grounded in empirical research and rich ethnographic traditions.

## **1.2. A proposed model**

The cultural moral evolution model, as outlined in this paper, delves into the progression a dominant culture might undergo in its interaction with an emerging or marginalized subculture, in this case the LGBTQ+ communities. The model serves as a framework to comprehend the evolving dynamics between different cultural groups over time. It is imperative to recognize that such models are generalizations and may not fully capture the intricate and unique nuances of real-world cultural dynamics. Each cultural interaction is distinct, embedded in its own context and complex history, and should be understood individually.

Below is an overview of each stage of the proposed model:

1. Neutral: The dominant culture is largely unaware or indifferent to the emerging or marginalized subculture. The subculture exists relatively invisibly, with no significant engagement from the mainstream.
2. Apprehension: As awareness of the subculture grows, the dominant culture may begin to feel apprehensive, often due to misunderstandings, unfamiliarity with the subculture's practices or beliefs, or perceived differences in values.
3. Fear: Apprehension can escalate to fear if the dominant culture perceives the subculture as a threat to its norms, values, or societal structure, usually based on stereotypes, misinformation, or a perceived challenge to the established order.
4. Anger: Fear may give way to anger, particularly in the face of incidents that exacerbate tensions. This anger is often directed at the subculture and can manifest in discrimination, hostility, and sometimes violence.
5. Acrimony: This stage is characterized by sustained bitterness and resentment. The dominant culture actively opposes and criticizes the subculture, attempting to suppress or marginalize it further, potentially harming social cohesion.
6. Acceptance: Through exposure, education, and dialogue, the dominant culture may gradually accept the subculture. This acceptance is a recognition of the subculture's right to exist and its potential contributions to society, rather than full agreement or endorsement.
7. Integration: In this stage, the subculture becomes an integral and valued part of the broader cultural mosaic. It is marked by mutual respect, collaboration, and often the blending of cultural aspects.
8. Belonging: The new stage of belonging represents a deeper level of inclusion and acceptance. Here, the subculture not only coexists but is fully embraced and celebrated within broader society. It signifies a stage where the distinct identity and contributions of the subculture are not just recognized but are also integral to the collective societal identity.

It is crucial to note that these stages are not strictly linear nor universally applicable. Cultural groups may experience these stages differently, and not all interactions may reach the stage of belonging. Furthermore, these stages can overlap or revert, influenced by various social, political, and economic factors.

### **1.3. Societal markers**

To enhance the cultural moral evolution model further, incorporating societal markers such as laws, human rights, religion, and academic teaching provides a more

comprehensive understanding of how these elements interact with each stage. To further develop the model by integrating these markers, we can examine how these factors influence and are influenced by each stage of the model. This approach offers a more comprehensive understanding of the interaction between dominant and emerging or marginalized subcultures.

The first stage can be described as neutral. At this stage, laws may not specifically address the subculture, reflecting a general indifference or lack of awareness in the legal framework. Human rights issues specific to the subculture might also be unrecognized or unaddressed, indicating a similar oversight in human rights advocacy. Additionally, religious institutions and teachings may neither acknowledge nor engage with the subculture, showing a disconnect or disinterest at the spiritual level. In academia, there may be a lack of research or courses related to the subculture, which mirrors the broader societal indifference. At the next stage, apprehension, legal systems might begin to recognize issues related to the subculture, often through conflicts or legal challenges, marking a shift towards greater legal awareness. Simultaneously, awareness of potential human rights concerns specific to the subculture begins to grow, indicating a budding recognition of its unique needs. In the realm of religion, discourse may start to address or debate issues related to the subculture, showing an evolving engagement at a spiritual level. Meanwhile, academia may begin to study the subculture, though often through a lens of otherness or difference, reflecting an initial but perhaps limited attempt to understand its complexities.

The third stage is fear. At this level, laws might be enacted that indirectly or directly target the subculture, often under the guise of preserving public order or traditional values, indicating a legal response that may not fully consider the subculture's rights. Alongside this, human rights violations against the subculture may increase, often justified with fearmongering, reflecting a concerning trend in societal treatment. In religious contexts, teachings may explicitly condemn or warn against the subculture, reinforcing societal fears and biases. Meanwhile, academic discourse on the subject may become polarized, with some scholars reinforcing stereotypes while others advocate for a more nuanced understanding, illustrating complex and varied academic responses to the subculture.

The next stage, anger, is marked by discriminatory laws, or law enforcement practices may become more prevalent, highlighting a troubling trend in legal approaches towards the subculture. Concurrently, instances of human rights abuses may escalate and receive more public attention, signalling an increasing concern for the well-being of the subculture. In the realm of religion, institutions may actively lobby against the rights or presence of the subculture, further intensifying societal divides. Meanwhile, academic debates on the topic may become more heated, reflecting the broader societal tensions and the polarized views within scholarly discussions. The anger stage finally softens at the acrimony stage. Here, legal battles may intensify as the subculture fights for recognition and rights, marking a period of increased legal activism.

Concurrently, systematic discrimination and human rights issues concerning the subculture may become a central topic of concern, highlighting the need for broader societal attention and action. In the religious sphere, some groups may engage in active campaigns against the subculture, further complicating the social dynamics. Meanwhile, academia may play a crucial role in challenging misconceptions and promoting understanding, serving as a pivotal force in shaping a more inclusive society.

As the culture evolves, anger and acrimony give way to acceptance. At this stage, the culture will begin to adopt laws, the beginnings of the cultural evolution to protect the rights of the subculture, reflecting a significant shift in societal attitudes towards greater inclusivity. Alongside this legal progression, there is greater recognition and protection of the subculture's human rights, indicating a more comprehensive approach to ensuring its welfare. In the realm of religion, some groups may begin to accept or even advocate for the subculture, showcasing a transformative shift in spiritual communities. Concurrently, there is an increased academic focus on the subculture, contributing to a broader societal understanding and facilitating deeper insights into its dynamics.

At the integration stage, the culture itself will experience an awakening. There is comprehensive legal protection and recognition of the subculture, indicating a matured legal framework that fully acknowledges its rights. This is paralleled by the full integration of human rights considerations for the subculture, ensuring well-being is a priority across societal domains. In the religious sector, there is significant acceptance and inclusion, with some groups even incorporating elements of the subculture into their practices, reflecting growing spiritual openness. Additionally, robust academic research and teaching on the subculture both reflect and contribute to its societal integration, highlighting the important role of academia in fostering understanding and acceptance.

At the stage of belonging, laws not only recognize and protect the subculture but also actively promote inclusivity and equality. Legislation is characterized by measures that ensure the full participation of the subculture in all aspects of societal life, including equal representation, anti-discrimination policies, and laws that celebrate cultural diversity. Human rights are fully realized for the subculture, emphasizing the rights to cultural expression, identity, and participation. This stage sees a society where human rights are a living reality, contributing to a sense of security, dignity, and equality. In terms of religion, the belonging stage is marked by interfaith harmony and respect, with religious institutions and beliefs incorporating understanding and acceptance of the subculture. This often leads to interreligious dialogues, collaborations, and celebrations of religious diversity, where differences are valued as part of the rich tapestry of society. Academically, institutions play a pivotal role in fostering a sense of belonging. Curricula are inclusive, reflecting the history, values, and contributions of the subculture. Research and academic discourse promote a deeper understanding and appreciation of the subculture, contributing to an en-

vironment where knowledge and learning bridge cultural divides. In the final stage, societal markers are not passive reflections but active agents in fostering a deep sense of inclusion and acceptance. Laws, human rights, religion, and academic teaching all converge to create a societal environment where the subculture is not just integrated but is a fundamental and celebrated component of the social fabric. This stage represents the pinnacle of cultural moral evolution, where differences are not just acknowledged but are the basis of the society's strength, unity, and vibrancy.

In this expansion of the model, societal markers are dynamic elements that both reflect and influence the cultural forces at each stage. This proposed model emphasizes the complex interplay between cultural perceptions and societal institutions, highlighting the multifaceted and intricate nature of cultural moral evolution.

## **2. Application of the cultural moral evolution model to three countries**

### **2.1. Introduction**

The legal landscape surrounding LGBTQA+ rights and protections varies significantly across different countries, reflecting unique cultural, political, and religious influences. The Netherlands, Malaysia, and Saudi Arabia serve as intriguing case studies, each presenting distinct frameworks that shape the lived experiences of LGBTQA+ individuals within their borders. The Netherlands stands out for its progressive evolution towards LGBTQA+ acceptance, marked by inclusive laws and cultural shifts that foster an environment where individuals can express their identity freely. In contrast, Malaysia grapples with the complexities of balancing academic freedom with political and religious sensitivities, particularly concerning LGBTQA+ issues. Saudi Arabia operates as an absolute monarchy and does not have a legally binding written constitution; instead, the Basic Law of Saudi Arabia, adopted by royal decree in 1992, serves a foundational role. This document outlines the responsibilities and processes of the country's developing institutions, though it lacks the specificity typically associated with a formal constitution. Additionally, the Basic Law declares that the Quran and the Sunna, which are central religious texts, function as the nation's constitution (Immigration and Refugee Board of Canada, 2011).

### **2.2. The law: LGBTQA+ rights and protections**

Despite constitutional provisions for religious diversity, Malaysia's state religion of Islam and its conservative social attitudes pose challenges for LGBTQA+ rights and freedoms (Aldous, 2008; Tizmaghz, 2014). Meanwhile, Saudi Arabia's adherence to strict Islamic laws, including the prohibition of homosexuality under Shariah law, underscores the significant hurdles faced by LGBTQA+ individuals in a conservative religious and cultural context (Crystal, 2001; Eskridge, 2008; Kligerman, 2007).

These contrasting legal frameworks and societal attitudes offer a nuanced understanding of the challenges and progress in LGBTQA+ rights advocacy worldwide. The Netherlands, Malaysia, and Saudi Arabia showcase diverse legal frameworks regarding LGBTQA+ rights and protections, reflecting varying levels of acceptance and tolerance within each country. The Netherlands has evolved to embrace LGBTQA+ rights through inclusive laws and cultural shifts, allowing individuals to express their identity freely. The constitutional monarchy and parliamentary democracy provide avenues for citizens to influence policies, fostering a sense of inclusion and participation in governance. Malaysia, while making strides in higher education and development, faces challenges in maintaining academic freedom due to political and religious sensitivities. Despite Islam being the state religion, the Malaysian Constitution allows for the practice of other religions in peace and harmony, indicating a level of tolerance towards religious diversity (UCLA School of Law, 2020). Saudi Arabia, on the other hand, governed by strict Islamic Shariah laws, prohibits homosexuality, posing significant challenges for LGBTQA+ individuals. The country's conservative interpretation of Islam and adherence to Wahhabism limit the rights and freedoms of LGBTQA+ people, leading to discrimination and persecution (Zelin, 2016). This is further evident through of these precepts in the segregated educational system currently in place (Allmnakrah, 2019).

### **2.3. Education: LGBTQA+ integration and education policies**

The Netherlands' high-quality educational system promotes research, innovation, and collaboration, fostering an inclusive environment where LGBTQA+ individuals can express their identity without fear of discrimination. The cultural and moral evolution in the country has led to greater acceptance and support for LGBTQA+ rights within academic institutions (Huang, 2017). Malaysia's higher education sector has made advancements in research and development but faces limitations in academic freedom due to political and religious influences. While the Malaysian Constitution allows for religious diversity, LGBTQA+ issues may be subject to censorship or restriction within educational settings (Wittenborg University of Applied Science, 2014). Saudi Arabia's compulsory education system is governed by strict Islamic principles, limiting opportunities for LGBTQA+ integration and education. The conservative interpretation of Islam and adherence to Shariah law restrict discussions on LGBTQA+ topics, perpetuating stigma and discrimination within educational institutions (Maria, 2015).

### **2.4. Religion: Major practices and influence**

In the Netherlands, Christianity is predominant, but the country embraces religious diversity, allowing for the practice of various faiths. This inclusive approach reflects a cultural and moral evolution towards acceptance and integration of LGBTQA+ individuals within religious communities (US Department of State, 2022c).

While Malaysia's state religion is Islam, the Constitution permits the practice of other religions, fostering a tolerant and inclusive society. However, the prohibition of homosexuality under Shariah law may conflict with LGBTQA+ rights and freedoms, posing challenges for religious acceptance and integration (US Department of State, 2022a; Wittenborg University of Applied Science, 2014). Saudi Arabia's adherence to strict Islamic laws and principles influences societal norms and practices, including attitudes towards LGBTQA+ people. The conservative interpretation of Islam and adherence to Wahhabism contribute to the marginalization and persecution of LGBTQA+ individuals within religious and cultural contexts (Maria, 2015; US Department of State, 2022b).

### **2.5. Human rights and cultural moral evolution**

The Netherlands' commitment to human rights and LGBTQA+ equality reflects a cultural and moral evolution towards inclusivity and acceptance. The legal framework and societal attitudes prioritize equality and non-discrimination, fostering a sense of belonging for LGBTQA+ individuals (Government of the Netherlands, n.d.; US Department of State, 2022c). Malaysia's journey towards human rights and LGBTQA+ acceptance is complex, with progress tempered by political and religious sensitivities. While legal protections exist, challenges remain in achieving full equality and inclusion for LGBTQA+ people within societal and religious frameworks (US Department of State, 2022a). Saudi Arabia's strict adherence to Islamic laws and principles restricts human rights and freedoms, particularly for LGBTQA+ individuals. The lack of legal protections and societal acceptance perpetuates discrimination and marginalization, hindering progress towards cultural and moral evolution (US Department of State, 2022b).

### **2.6. Summary**

The legal and societal status of LGBTQA+ rights varies significantly worldwide, influenced by distinct cultural, political, and religious contexts. The Netherlands showcases progressive LGBTQA+ acceptance through inclusive laws and societal shifts. In contrast, Malaysia struggles to balance academic freedom with political and religious pressures, impacting LGBTQA+ rights. Saudi Arabia enforces strict Islamic laws, such as the prohibition of homosexuality, which poses substantial challenges for LGBTQA+ individuals in a conservative setting.

Regarding education, the Netherlands supports a high-quality, inclusive educational system that allows LGBTQA+ individuals to freely express their identities, reflecting the nation's progression towards greater LGBTQA+ acceptance. Conversely, Malaysia's higher education faces challenges in maintaining academic freedom amid political and religious constraints. In Saudi Arabia, the education system, guided by stringent Islamic principles, limits LGBTQA+ inclusion and perpetuates stigma within educational settings. These variations underline the complex relationship be-

tween legal, societal, and educational factors in determining the conditions for LG-BTQA+ communities in different regions.

### **3. Application of the cultural moral evolution model to four states of the United States of America**

#### **3.1. Introduction**

When comparing the cultural, legal, academic, and human rights aspects in Hawaii, Florida, Alaska, and Colorado through the lens of cultural moral evolution, we observe distinct paths reflecting each state's approach to LGBTQA+ rights and broader societal issues. This comparative analysis incorporates the eight stages of cultural moral evolution and examines how each state aligns with these stages across the four cultural markers.

#### **3.2. The law: LGBTQA+ rights and protections**

##### *Hawaii*

Prior to the 19th century, Hawaiian society was influenced by Polynesian culture, which recognized a spectrum of gender expressions, including the *māhū*, who embodied a third gender role. *Aikāne* relationships, intimate partnerships between members of the same sex, were also accepted and integrated into the social fabric of the time (Kekaulaohi, 1894; Malinowski, 1922). The arrival of Christian missionaries in the 19th century marked a period of significant change. Under their influence, King Kamehameha III enacted the Blue Laws in 1833, which imposed Christian moral standards on the Hawaiian population. This era saw the introduction of explicit sodomy laws in 1850, which criminalized homosexual acts with severe penalties. Over the decades, the legal system hardened its stance against LGBTQA+ individuals, culminating by 1876 in laws that allowed for convictions under broad interpretations of sexual offences (Kekaulaohi, 1894).

The legal environment began to show signs of leniency in the final days of the 19<sup>th</sup> century, with the Territorial Supreme Court's 1899 decision to release a defendant due to procedural errors setting a precedent for future cases (Judgment of the Hawaii Territorial Court, 1899). However, throughout the mid-20th century, laws such as the 1949 'disorderly conduct' statute continued to target LGBTQA+ individuals by prohibiting public expressions of homosexuality. The last reported sodomy case, *Territory v. Bell* in 1958 (Judgment of the Hawaiian Territorial Court, 1958), illustrated the ongoing challenges faced by LGBTQA+ individuals, though by the late 20th century, the legal system had gradually begun to evolve. The 1972 revision of the Criminal Code removed many archaic laws, and in 1978, Hawaii amended its Constitution

to include privacy rights (US Department of Justice, 1972), although this did not initially extend to sexual privacy, as confirmed by *State v. Mueller* in 1983 (Native Hawaiian Justice Task Force, 1983).

A landmark period for LGBTQA+ rights in Hawaii occurred with the *Baehr v. Miike* case. After initially being denied, the litigation eventually led to a 1993 Supreme Court ruling that denying marriage to same-sex couples constituted discrimination based on sex (Judgment of the Supreme Court of Hawaii, 1996). This decision paved the way for further legal challenges and discussions regarding same-sex marriage. In 1997, Hawaii introduced reciprocal beneficiary relationships, providing legal recognition, albeit limited, to same-sex couples. However, the passage of Constitutional Amendment 2 in 1998 empowered the legislature to restrict marriage to opposite-sex couples, effectively halting progress towards same-sex marriage legalization (Judgment of the US Supreme Court, 2015).

The early 21st century saw continued advocacy for LGBTQA+ rights. In 2006, Joe Bertram became the first openly LGBTQA+ member of the Hawaii State Legislature (Lei Pua Ala, n.d.). Legislative efforts to recognize civil unions began gaining traction, culminating in the passage of Hawaii House Bill 444 in 2010, although it was initially vetoed by Governor Linda Lingle (Lambda Legal, n.d.). The election of Governor Neil Abercrombie in 2010 marked a turning point, leading to the eventual enactment of the civil union law in 2011, which Abercrombie signed into law. This act was a significant step forward, setting the stage for further advancements. On 17 December 2013, a historic moment unfolded as Genora Dancel, a plaintiff from the original 1990 case, married her partner in a ceremony presided over by Dan Foley, symbolizing the profound changes that had occurred over the decades. This marriage, held in the very courtroom where the battle for marriage equality had begun, underscored the progress made and the continued journey towards equality and recognition for all individuals, regardless of their sexual orientation or gender identity.

This narrative of Hawaii's LGBTQA+ legal history reflects broader trends in societal acceptance and the ongoing struggle for equal rights. It highlights the importance of both advocacy and legal challenges in achieving significant milestones in the quest for equality.

### *Florida*

Florida presents a mixed trajectory, initially moving towards acceptance but recently showing signs of regression or acrimony through restrictive laws affecting discussions about LGBTQA+ issues in schools and youth rights. LGBTQA+ rights in the state have evolved over time, influenced by federal rulings and state legislation. Since the early 2000s, significant legal changes have occurred, particularly relating to same-sex relationships and discrimination protections. Same-sex sexual activity in Florida was legalized following the US Supreme Court's decision in *Lawrence v. Texas*

in 2003 (Judgment of the US Supreme Court, 2003). Despite this, the state's sodomy laws were not repealed, rendering them unenforceable yet symbolically present. The legalization of same-sex marriage on 6 January 2015 marked a pivotal shift, following a district court ruling against the state's ban as unconstitutional. Additionally, discrimination based on sexual orientation or gender identity in employment, housing, and public accommodations has been illegal under federal law since the Supreme Court's 2020 ruling in *Bostock v. Clayton County*. In *Brenner v. Scott*, the US District Court ruled that Florida's same-sex marriage ban was unconstitutional (Cohen, 2014).

Local governments in Florida have also played a crucial role in extending protections: various cities and counties have enacted ordinances that prohibit discrimination, with approximately 55% of Florida's population living in areas that enforce such laws. Furthermore, certain locales have prohibited conversion therapy for minors, reflecting a growing recognition of LGBTQA+ rights at the municipal level (Radson, 2013).

The landscape for LGBTQA+ rights in Florida has recently faced challenges, however, particularly under the administration of Governor Ron DeSantis. Since 2021, there has been a notable pushback against rights for transgender individuals, including legislation that restricts transgender women and girls from participating in female sports, and laws that hinder access to gender-affirming healthcare for both minors and adults (Florida Senate, 2023a). The state has also seen the introduction of laws that potentially criminalize the use of bathrooms in public buildings by transgender individuals in accordance with their gender identity. The Medical Practitioner's Discrimination Law, passed in May 2023, allows medical practitioners to deny service based on personal belief, while Florida Senate Bill 254 (Florida Senate, 2023b), allows child custody modifications based on a child receiving gender-affirming care.

The rights of LGBTQA+ individuals to adopt and parent have also seen significant changes. Until 2010, homosexuals were explicitly prohibited from adopting children in Florida. This ban was overturned when an appeals court upheld a lower court's decision that the law violated constitutional protections (Judgment of the Florida Third District Court of Appeal, 2010). Since then, LGBTQA+ individuals and couples have the right to adopt children. *Lofton v. Secretary of the Department of Children and Family Services* (Judgment of the US Court of Appeal, 2004) upheld Florida's ban on homosexuals adopting children, but was later overturned. In the case of *In re: Gill, Judgment of the Florida Third District Court of Appeal, 2010*, (ACLU, 2010), the state appeals court ruled that the ban on same-sex adoptions violated equal-protection rights.

Although, in 2015, the state passed reforms repealing the 1977 ban on homosexual adoption, Florida was also one of the US states to limit medical access to gender-affirming surgery for minors (Florida Senate, 2023).

In opposition to the new discriminatory and restrictive state laws, local communities have enacted ordinances and legislation to protect the LGBTQA+ community (Radson, 2013). These local actions and community responses have significantly influenced the landscape of LGBTQA+ rights in Florida (Lopez, 2023). For instance, some cities, like Lake Worth, have declared themselves as sanctuaries for LGBTQA+ individuals, aiming to provide greater protections against discrimination. Community responses and legal challenges continue to play a crucial role in shaping the state's policies and the rights of LGBTQA+ residents (Radson, 2013).

While there has been substantial progress in recognizing and protecting LGBTQA+ rights in Florida, significant challenges remain, especially concerning transgender rights and the recent rollback of protections. The ongoing legal and legislative battles highlight the complex landscape of LGBTQA+ rights in the state, reflecting broader national debates over these issues. These cases and statutes represent significant legal benchmarks in the evolution of LGBTQA+ rights in Florida, addressing a range of issues from marriage equality and employment discrimination to adoption and transgender rights.

### *Colorado*

LGBTQA+ individuals in Colorado have the same rights as non-LGBTQA+ residents. Since 1972, same-sex sexual activity has been legal, and since October 2014, the state has recognized same-sex marriage. In 2013, Colorado implemented civil unions, granting many marital rights and benefits. Discrimination based on sexual orientation or gender identity is banned in areas such as employment, housing, and public accommodations. Additionally, the state prohibits conversion therapy on minors. One very onerous defence of violence against the LGBTQA+ community was that of 'gay panic', an actual example of which claimed that 'a gay man came on to me, so I beat him senseless, because I find homosexuality offensive'. As of July 2020, Colorado eliminated the 'gay panic' defence, becoming the 11th US state to do so (LGBTQ+ Bar, n.d.)

Colorado ranks highly for LGBTQA+ rights within the Mountain West region, second only to Nevada according to the Movement Advancement Project (n.d.). A 2019 survey by the Public Religion Research Institute indicated that 77% of Coloradans support anti-discrimination laws for LGBTQA+ people. Historically, the state's treatment of LGBTQA+ individuals has evolved significantly. In the early 20th century, punishments for homosexual acts were severe and socially humiliating. The indigenous Arapaho people, however, recognized a 'third gender', known as *haxu'xan*, which included male-bodied individuals living and behaving as women, underscoring a historical acknowledgment of gender fluidity (Eskridge, 2008).

Laws regarding sodomy (Kane 2007) have shifted dramatically over the years. While it was initially criminalized in the 1860s with severe penalties, the legal stance

softened gradually until 1971, when Colorado decriminalized sodomy between consenting adults in private (Colorado Senate, 1971). Following this, further progress was made with the decriminalization of other acts and the striking down of discriminatory laws, largely due to activism, such as efforts by the Gay Coalition of Denver (Movement Advance Project, n.d.). The recognition of same-sex relationships has also seen significant changes. In 1975, Boulder County issued marriage licences to same-sex couples, a move later contested but significant in its challenge to traditional definitions of marriage. Although a state referendum in 2006 restricted marriage to opposite-sex couples, by 2009, Colorado was enacting laws to recognize same-sex partnerships in various legal contexts, including inheritance and decision-making in medical emergencies (Movement Advance Project, n.d.). Civil unions were formally recognized in 2013, providing comparable rights to married couples, following endorsements and legislative efforts supported by state leadership. The legalization of same-sex marriage in 2014 marked a pivotal moment, as it came about through both judicial decisions and legislative adjustments. Examples of changes in laws affecting the LGBTQA+ community in Colorado include the decriminalization of sodomy in 1971 for private acts between consenting adults (Eskridge, 2008);

Designated Beneficiaries Law of 2009, which allows individuals to designate a same-sex partner for rights such as inheritance and medical decisions (Colorado Bar Association (2009)) legal recognition of same-sex marriage in 2014 following the Tenth Circuit Court's decisions and state directives; legal establishment of civil unions offering comparable rights to marriage in 2013 (Moreno, 2013); It was not until 2024, the Colorado Senate amended to the state constitution which defined marriage as between a man and a woman. It should be noted, the amendment to define marriage was only in 2006.

Adoption rights for LGBTQA+ individuals and couples in Colorado are comprehensive, allowing petitions for adoption by single persons and same-sex couples. Access to assisted reproduction services and legal recognition of parental rights, regardless of biological connection, highlight the state's progressive stance. However, certain religiously based adoption agencies still impose restrictions. Examples of changes in Colorado laws granting protection to the LGBTQA+ community in a familial setting include LGBTQA+ individuals and couples being able to adopt children, with laws facilitating second-parent adoption (2013); state law acknowledging non-biological parents in same-sex relationships as legal parents under certain conditions (2022); and Marlo's Law (State of Colorado, 2022), which simplified the adoption process for non-gestational parents in cases of IVF.

Discrimination protections have been solidified over the years, with Colorado prohibiting discrimination based on sexual orientation or gender identity in several domains since 2008. These protections extend to bullying in schools, which must have specific policies and prevention strategies. Despite some historical setbacks, such as

the 1992 approval of a discriminatory constitutional amendment, which was later overturned, the legal landscape has largely moved towards inclusivity (Law Week, (2018). Examples of Colorado laws granting protection to the LGBTQA+ community are the Anti-Discrimination Law of 2008, which prohibits discrimination based on sexual orientation or gender identity in employment, housing, and public accommodations, and the Anti-Bullying Law, which mandates schools to have policies preventing bullying on the basis of sexual orientation or gender identity, among others.

Colorado also has hate crime laws that enhance penalties for offences motivated by the victim's sexual orientation or gender identity. In recent years, these protections and recognitions have been extended to address emerging issues such as algorithmic bias and online discrimination. Notably, Colorado passed HB20-1307, the Abolition of Gay Panic Defense (Burness, 2020), disallowing this defence in court cases of violence towards members of the LGBTQA+ community; prior to this, a defendant could raise the defence of 'gay panic', an irrational fear of the gay community which drove the defendant to violence. The rights of transgender individuals have also progressed, with Colorado removing surgical requirements for changing gender markers on identification documents in 2019. This inclusivity extends to health insurance, which, since 2023, must cover gender-affirming surgeries. Examples of Colorado laws granting protection to the LGBTQA+ community in this area are the laws on gender marker changes (2019); removing the surgery requirement for changing gender markers on identification documents (One Colorado, 2023); Inclusive Health Insurance (Colorado General Assembly, 2023a), which mandates coverage for gender-affirming surgeries in health insurance policies; and Gender-Affirming Healthcare legislation, enacted to safeguard access to gender-affirming healthcare (Colorado General Assembly, 2023b).

Finally, Colorado's legislative environment reflects a continued commitment to the rights of LGBTQA+ individuals, evident in the banning of conversion therapy for minors and efforts to ensure freedom of expression and equal treatment under the law. The state serves as a model of progressive change, fostering an environment of acceptance and equality. Examples of these protections and other notable milestones are the Conversion Therapy Ban (2018), prohibiting conversion therapy for minors and making it illegal for licensed therapists to attempt to change a minor's sexual orientation (Colorado General Assembly, 2018); the Veterans' Benefits Restoration law (Colorado General Assembly, 2021a), restoring benefits to LGBTQA+ veterans dishonorably discharged under the 'Don't Ask, Don't Tell' policy (see below); and freedom of expression cases related to the expression of LGBTQA+ identities, such as a ban on rainbow flags (Colorado General Assembly, 2021b). These laws and regulations demonstrate Colorado's progressive stance on LGBTQA+ rights and protections over the years.

### **3.3. Education: LGBTQA+ integration and education policies**

In the educational sphere, Hawaii indicates stages of integration and belonging, suggesting an inclusive educational environment free from censorship on LGBTQA+ issues (Hawaii Department of Education, n.d.). Florida's recent policies, such as the 'Parental Rights in Education' bill, suggest a regression to fear and acrimony, limiting LGBTQA+ discussions and impacting inclusivity (Florida House of Representatives, 2022). Alaska and Colorado are in stages of acrimony or acceptance, with efforts aimed at addressing educational disparities and improving systems to foster a more equitable environment.

### **3.4. Religion: Major practices and influence**

First-Nation people in Hawaii, Colorado, Alaska, and Florida have long recognized a third gender as a part of their individual cultures; for example, the Creek Seminole people of Florida recognize four genders (Lang, 1998; Lei Pua Ala, n.d.; Malinowski, 1922)(Live Journal, 2012). In all states, this changed with the arrival of Western European settlers bringing the Protestant and Catholic faiths and conservative views towards sex and sexuality. With the exception of Florida, the other states are moving towards acceptance of and belonging for the LGBTQA+ community. There appears, however, to be continued resistance from conservative members of the Protestant and Catholic religions. For example, Catholic charities will not allow gay couples to adopt(Rittiman 2013). In 2023, Pope Francis presented an edict allowing the blessing of gay unions, short of marriage; in response, many of the United States' Catholic bishops have refused to allow for such a blessing, stating '[a] sin cannot be blessed' (Gramon & Harmon, 2023).

This analysis does not detail the direct influence of religious practices in Hawaii, Alaska, Colorado, and Florida on LGBTQA+ rights. Each state has a diverse tapestry of faiths. Despite this diversity, Alaska's, Colorado's, and Hawaii's religious landscapes, including a significant presence of evangelical Christians and conservative Catholics, seem to moving 'backward' from embracing and codifying early First Nations' attitudes towards the LGBTQA+ community, which was one of acceptance and inclusion. The populations of all four states have seen increased secularization, a factor which should also be considered; secularization of the community can limit the influence of religious faiths in the formation of laws and the creation of an educational curriculum.

### **3.5. Human rights and cultural moral evolution**

Regarding human rights, Hawaii demonstrates a trajectory towards integration and belonging, fostering community and equality for LGBTQA+ individuals, considering the legislative authority passed to protect and ensure the rights of the LG-BTQA+ community in the state. Florida shows a complex path, with recent legislative actions suggesting shifts towards the earlier stages, fear and acrimony, challenging

previous gains in acceptance and integration. Nonetheless, statewide protections against discrimination based on sexual orientation or gender identity align with acceptance. Alaska and Colorado are seen as moving towards integration and belonging, with efforts to recognize and integrate diverse populations' rights, fostering a sense of belonging for all community members. In 2023, Alaska's human rights record included several notable efforts and initiatives by the Alaska State Commission for Human Rights, which updated its LGBTQA+ employment discrimination guide, reflecting a policy to investigate workplace sexual discrimination complaints, particularly related to transgender employees and issues of gender identity and expression in the workplace. This guide is based on federal and state laws and aims to provide clarity for both employers and LGBTQA+ employees (Alaska State Commission for Human Rights, 2024). Additionally, the Commission has been actively involved in various initiatives and resolutions, for instance adopting resolutions concerning disability rights, public accommodations, and human trafficking. These include efforts to support the rights of people with disabilities, encouraging the procurement of braille printers for state agency offices, and advocating for state agencies to cooperate in combating human trafficking (Alaska State Commission for Human Rights, 2024).

### **3.6. Summary**

A comparative analysis within the cultural moral evolution framework reveals varied approaches to LGBTQA+ rights and societal issues across Hawaii, Florida, Alaska, and Colorado. Hawaii exemplifies a progression towards inclusivity and equality, whereas Florida's path reflects a fluctuating approach influenced by recent restrictive legislation. Alaska and Colorado demonstrate a commitment to integrating diverse societal needs and promoting inclusivity, aligning with the latter stages of cultural moral evolution. This comparison underscores the dynamic nature of cultural and moral attitudes towards LGBTQA+ communities and broader societal issues, highlighting the importance of continuous advocacy, policy refinement, and social engagement to foster inclusive and equitable environments across the United States.

## **4. Application of the cultural moral evolution model to the United States Navy**

### **4.1. Introduction**

The United States Navy, a branch of the US Armed Forces, has historically reflected broader societal attitudes towards the LGBTQA+ community. This section of our comprehensive study delves into the US Navy's intricate journey, as it navigates the evolving cultural and moral landscapes concerning LGBTQA+ service members

(Naval Historical Foundation, n.d.). From the stringent policies of the past to the more inclusive approaches of the present, the Navy's transformation offers a unique perspective on the intersection of military culture, policy, and societal change. The history of the US Navy is rich with examples of how laws and internal policies have both reflected and influenced the status and treatment of LGBTQA+ individuals within its ranks. This analysis aims to explore these changes, understanding them not just as isolated policy shifts, but as indicators of a deeper evolution in cultural morals and attitudes. By examining key legislative and administrative milestones, changes in training and education, and the shifting attitudes of service members and leadership, we can gain insights into the broader narrative of LGBTQA+ integration and acceptance within the military.

Moreover, this part of the study aims to place the Navy's journey in the context of the wider US military, drawing comparisons with the cultural moral evolution of other branches, like the Army, Air Force, and Marines. These comparisons will highlight both the shared paths and unique trajectories of each branch, offering a comprehensive view of the military's progress towards LGBTQA+ inclusion and acceptance. Through this analysis, we seek not only to understand where the Navy stands today in its treatment and acceptance of LGBTQA+ individuals but also to trace the path it has taken to reach this point. This exploration is crucial for comprehending the broader implications of military policies and culture on the integration and acceptance of the LGBTQA+ community within one of the nation's most fundamental institutions.

#### **4.2. Historical context**

The historical trajectory of the LGBTQA+ community within the United States Navy is a compelling reflection of broader societal and policy shifts. Initially, the Navy, in line with other military branches and societal norms, enforced strict prohibitions against LGBTQA+ individuals serving openly. This stance was deeply influenced by the predominant views of the mid-20th century, which regarded homosexuality as a disorder and a security risk. Such perceptions led to stringent investigations and the discharge of service members suspected of homosexual behaviour (Naval Historical Foundation, n.d.).

The introduction of the 'Don't Ask, Don't Tell' (DADT) policy in 1993 marked a major turning point (Naval Historical Foundation, n.d.) This policy excluded openly gay, lesbian, or bisexual people from military duty, while forbidding military personnel from discriminating against or harassing closeted homosexual or bisexual service members. Reflecting the social and political issues surrounding the presence of openly homosexual people in the military, DADT was a difficult and divisive compromise (Naval Historical Foundation, n.d.). The repeal of DADT in 2011 marked a pivotal moment in the Navy's history, signalling a transformative shift in approach. For the first time, LGBTQA+ service members were permitted to serve openly, a change that was both a result of and a catalyst for evolving societal attitudes.

This policy shift signified an important move towards greater acceptance and integration of LGBTQA+ individuals within the military (Stillwell, 2011).

However, the journey towards full acceptance and integration of LGBTQA+ individuals within the Navy has continued to face challenges. Key issues have included the rights of transgender service members and the provision of benefits to same-sex partners. These ongoing debates and policy changes underscore the complexity of the Navy's evolving stance on LGBTQA+ issues. This historical evolution is not just a tale of changing policies; it encapsulates the dynamic interplay between the Navy's internal culture and broader societal attitudes towards the LGBTQA+ community.

#### **4.3. Policy evolution**

The 1993 implementation of the DADT policy marked a significant change in the system. Despite appearing to be a compromise, this policy kept LGBTQA+ service personnel at a total disadvantage. DADT forbade service members from revealing their sexual orientation, hence compelling LGBTQA+ people to serve with a secret. Many people believed that the policy was just a less onerous version of the discriminatory practices that had been in place before. The repeal of DADT in 2011 was a watershed moment for the Navy, fundamentally altering its approach to LGBTQA+ service members. The repeal allowed for open service by LGBTQA+ individuals, a move that was both a reflection of and a contributor to changing societal attitudes. The post-DADT era in the Navy marked the beginning of a more inclusive environment, though the transition was not without its challenges. The repeal necessitated the revision of numerous policies and training programmes to ensure the integration and fair treatment of LGBTQA+ service members.

The evolution of Navy policy took another significant step with the inclusion of transgender service members. The decision to allow transgender individuals to serve openly, initially made in 2016, was a progressive move that acknowledged the diversity within the LGBTQA+ community. However, this policy has been subject to reversals and reinstatements, reflecting the ongoing political and social debates surrounding transgender people.

Currently, the US Navy continues to grapple with the complexities of integrating and supporting LGBTQA+ service members fully. Policies are continually being reviewed and updated to address issues such as equal opportunity, anti-discrimination measures, and healthcare provisions for transgender service members. The current policy trajectory indicates a growing recognition of the rights and contributions of LGBTQA+ individuals within the Navy, but it also highlights the need for ongoing advocacy and policy refinement (USS Constitution Museum, n.d.).

#### **4.4. Cultural shifts**

The repeal of DADT in 2011 marked not only a policy change but also a significant cultural shift within the US Navy. This repeal heralded a new era of openness

and, gradually, a shift in attitudes among service members and leadership (USS Constitution Museum, n.d.). The Navy's emphasis on education and training has been a major contributor to this sum of cultural change. The Navy created extensive training programmes after DADT, with the goal of fostering respect and understanding for LGBTQA+ service members (USS Constitution Museum, n.d.). The goals of these training sessions were to inform Navy personnel about the new regulations, the value of diversity, and how to stop harassment and discrimination. The eradication of stereotypes and promotion of an inclusive atmosphere have been greatly aided by this teaching strategy.

Leadership within the Navy has also played a pivotal role in guiding this cultural evolution. Leaders who openly support LGBTQA+ inclusivity set a tone of acceptance and respect. Additionally, the presence and advocacy of LGBTQA+ service members and allies within the ranks have been instrumental in driving change; their voices have helped to challenge prejudices and encourage a more accepting and supportive culture (Stromko, 2022). The social dynamics within the Navy have also completely evolved in response to these policy and cultural shifts. The increasing visibility of LGBTQA+ service members has normalized their presence, leading to more inclusive interactions and relationships among service members. This normalization has been a gradual process, with the Navy community learning to embrace diversity in sexuality and gender identity as part of its broader commitment to equality and respect for all personnel.

Despite these positive trends, challenges remain. Issues such as persistent biases, the need for ongoing education, and the integration of transgender service members illustrate that cultural evolution is an ongoing process. The Navy continues to work towards a culture where all service members, regardless of their sexual orientation or gender identity, are valued and can serve without fear of discrimination or prejudice.

#### **4.5. Summary**

The examination of the US Navy's journey towards the integration and acceptance of LGBTQA+ service members reveals a profound evolution in policies, attitudes, and cultural dynamics. This evolution reflects a broader narrative of change, not only within military institutions but also in societal perceptions and legal frameworks regarding LGBTQA+ individuals (Naval Historical Foundation, n.d.). The Navy's transformation, particularly since the repeal of 'Don't Ask, Don't Tell', mirrors the shifting societal attitudes towards the LGBTQA+ community. It underscores how changes in public sentiment and legal rights can influence and be influenced by military policies and culture. This interplay between societal trends and military policies highlights the Navy's role as both a reflection of and a participant in broader cultural shifts. The evolution of inclusive policies in the Navy has significant implications for the morale, cohesion, and effectiveness of the force. By embracing diversity and promoting an environment of respect and acceptance, the Navy not only adheres

to fundamental principles of equality but also enhances its operational capabilities. Inclusivity in the ranks ensures that the Navy benefits from the talents and skills of all service members, irrespective of their sexual orientation or gender identity.

Despite significant progress, the journey towards full acceptance and integration of LGBTQA+ individuals in the Navy is ongoing. Challenges related to biases, ongoing education, and the complete integration of transgender service members persist. Addressing these challenges requires continuous effort, advocacy, and policy refinement. The future direction of the Navy's policies and culture will likely continue to evolve in response to both internal and external influences, striving towards an increasingly inclusive and equitable institution. The Navy's journey towards LGBTQA+ acceptance and integration offers valuable insights into the dynamics of cultural moral evolution within large, structured organizations. It serves as a case study in managing change, balancing tradition with progress, and the importance of leadership in shaping inclusive cultures. As the Navy continues to evolve, it sets a precedent for other military and civilian institutions, highlighting the vital role of inclusivity and respect for diversity in any organization's moral and operational fabric.

## Summary

We have proposed a model of cultural moral evolution which seeks to describe the stages through which a dominant culture interacts with and adapts to an emerging or marginalized subculture. In this particular case, the subculture is defined as the LGBTQA+ community within the dominant culture. The model delineates a progression from indifference or ignorance to eventual acceptance and integration. Each stage represents shifts in attitudes, policies, and interactions between the dominant culture and the subculture. This framework is compared to cultural anthropology, highlighting differences in focus, approach, purpose, and limitations. It also presents an overview of each stage of the proposed model, from neutral to belonging, emphasizing that these stages are not strictly linear and may vary based on societal, political, and economic factors. Additionally, the integration of societal markers such as laws, human rights, religion, and academic teaching enhances the understanding of each stage's dynamics.

This philosophical model should be construed neither as qualitative nor quantitative in nature. Nothing should be construed as judgemental. It can, however, be used as a starting point to examine how cultures and subcultures respond to those who have always been here and among us. The proposed model of cultural moral evolution provides a structured framework for understanding how societies adapt to cultural diversity, primarily from a moral and ethical standpoint. It acknowledges the complexities of cultural interactions and emphasizes the importance of societal markers in shaping these dynamics. However, it also raises questions about the po-

tential for de-evolving and the reversal or directional shifts of cultural trends. While the model offers valuable insights into societal evolution, it is essential to recognize its limitations and the diverse perspectives that exist regarding cultural change. Ultimately, the model serves as a starting point for conversations about cultural dynamics and the complexities of human interaction, encouraging further exploration and dialogue.

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## Gender Identity in Cis-Heteronormative Legal Orders: A Comparative Approach – Poland and Mexico<sup>1</sup>

**Abstract:** In this article, we examine the legal challenges encountered by LGBT+ individuals in Poland and Mexico within the context of prevailing cis-heteronormative structures. These structures deeply influence societal and legal systems in both countries, resulting in marginalization and discrimination. We compare the development of LGBT+ movements and their impact on legislative changes by analysing enacted laws, court cases, and law proposals. The study highlights the progress and obstacles to achieving equality in each case: Mexico has made significant strides in recognizing non-binary perspectives and advancing LGBT+ rights, while Poland has faced setbacks due to the continuous rejection of progressive reforms. Both countries continue to navigate unique challenges in their pursuit of greater inclusivity for the LGBT+ community, offering valuable lessons from each experience.

**Keywords:** cis-heteronormative order, cis-normativity, gender identity, heteronormativity, human rights, non-binary identity

### Introduction

An exploration of legal dilemmas surrounding sexual and gender identity first requires an understanding of the pervasive influence of cis-normativity and heter-

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onormativity in our societies. Cis-normativity assumes the existence of only two genders – male and female – while heteronormativity dictates that romantic or sexual relationships are acceptable only between individuals of opposite sexes. These normative frameworks are deeply embedded in our societal and legal systems, establishing a binary paradigm that rigidly defines one sexual preference and two gender identities as the standard and norm. However, the reality for many within the LGBT+ community is much more nuanced. When we refer to LGBT+ in this text, it is fundamental to treat it as an ‘umbrella concept’ that encompasses a wide range of different groups with presumably diverse problems and claims, including lesbian, gay, bisexual, asexual, transsexual, and transgender people, as well as non-binary groups such as genderfluid, bi – and multigender, and agender individuals, among others. This internal diversity underscores the need for nuanced approaches to addressing legal challenges related to their sexual and gender identities.

This study seeks to unravel the main dilemmas and legal claims of LGBT+ groups in their pursuit of rights, thereby challenging the cis-heteronormative order, in two distinct yet intersecting contexts: Poland, a Member State of the European Union, and Mexico, a Latin American country. Despite their many differences, these nations share the influence of the Catholic religion on social life and policymaking, as well as documented discrimination against the LGBT+ community. Through a comparative lens, this research examines the legal frameworks shaping the rights and protections afforded to non-heteronormative and non-binary individuals in Poland and Mexico. By analysing enacted legislation, significant court cases, and proposed laws, it aims to illuminate pathways to progress and the persistent barriers that hinder equality and inclusion.

Structured into four main sections, this article begins with an exploration of individual and collective identities, drawing from constructivist and gender perspectives. It then delves into the challenges that evolving and broadening conceptions of human rights pose to prevailing cis-heteronormative orders. The subsequent sections offer comparative case studies, tracing the evolution of LGBT+ movements in each country and examining their legal advancements and gaps. The article concludes with key insights drawn from the analysis.

## **1. Individual identity and collective identity from a constructivist and gender perspective**

The concept of identity gained popularity at the turn of the 20th and 21st centuries. It has been studied from the perspective of many research areas, including sociology, psychology, cultural studies, anthropology, and legal sciences. The popularity and ubiquity of the term has led some to consider it a ‘buzzword’ (Cornwall, 2007, p. 70). Regardless of emerging scepticism, the problem of identity has become

a leading topic of both scholarly and political discourse, opening many areas of theoretical and practical exploration. The question of who needs identity and why it is essential has gained prominence, especially in the context of advancing globalization (Świątkiewicz-Mośny, 2015, pp. 7–8). This phenomenon is characterized by the concurrent convergence and divergence of cultures, including legal cultures (Nawrot et al., 2012). Consequently, identity emerges as a lens through which we interpret and understand the world (Bauman, 2007, pp. 14–15). Although the concept of identity is polysemic and multidimensional, this study will focus on individual (personal) identity in relation to the collective (general, social) identity of non-heteronormative and non-binary individuals belonging to the LGBT+ community.

It should first be emphasized that individual identity is linked to our relationships with others, reflecting self-awareness. To form this identity, we engage in a shared ‘symbolic world of meanings’. Collective identity, on the other hand, asks ‘who are we in relation to other groups?’ It arises from the human need for affiliation and similarity with others (Dziekanowska, 2008), being shaped by cultural and psychological factors, and distinguishing one group from another. Identity is thus both the ‘image of oneself’ and ‘the image of one’s group’. Multiculturalism has greatly contributed to the intensification of the processes of transforming and negotiating identity (Paleczny, 2008, p. 42).

Gender identity, a fundamental element of individual and collective identity within LGBT+ groups, has conventionally been linked to biological sex, determined by genitalia and genetics. It was assumed that these biological factors were the primary determinants of the observed differences between males and females, and consequently the resulting social disparities between them. This perception thus framed gender identity as a natural and spontaneous manifestation of sex (Mayobre Rodríguez, 2007, pp. 35–36), with males typically associated with strength and protection, while females often regarded as weaker, primarily oriented toward childbearing. These beliefs shaped social norms and relationships within what we call here a cis-heteronormative framework, seen as natural due to its alignment with biologically ascribed characteristics (the so-called ‘ascribed identity’).

Constructivists have challenged the notion that the cis-heteronormative societal order is determined solely by biological factors, arguing instead that it is primarily a social construct shaped by power structures (Foucault, 1990). This intersection between power and the construction of ideas (or concepts), often referred to as knowledge, is central to Foucault’s theory, and has been extensively taken up in feminist, gender, and queer theories (Ahmed, 2020; Butler, 2002; De Lauretis, 2000; Wittig, 1992). Through the construction of knowledge – defining what is true, normal, and desirable – norms are established to reinforce these constructs while marginalizing deviations. This process thus leads to both naturalization (perceived as natural and true) and normalization (considered as normal and desirable). Foucault’s analysis fo-

cuses on the division between normal and abnormal behaviours, using heteronormative human sexuality as a key example. Various political and social forces seek to assert control over human reproduction, resulting in the creation of rules that regulate sexual behaviour, often categorized as a form of biopower, effectively marginalizing, pathologizing, and criminalizing those deemed outside the norm (Foucault, 1990).

While Foucault focuses on heteronormativity as a form of oppression rooted in the control of human reproduction, feminists and queer theorists like Judith Butler argue that oppression also stems from cis-normativity, which governs broader human roles. Firstly, it perpetuates the historical subjugation of one gender, typically female, by power structures. Secondly, gender identity must be further deconstructed; this is necessary not only because assigned sex may not align with perceived gender identity, resulting in individuals being ‘male-bodied’ but identifying as female, or vice versa, but also because various identities exist outside the traditional gender binary (Butler, 2002).

Recent medical progress presents both opportunities and risks, as it can lead to the reinforcement of biopower, seeking to control, normalize, and ‘correct’ individuals who fall outside the cis-heteronormative order, or, on the contrary, to its contestation. For instance, there has been significant progress in understanding sexual orientation and gender identity. The World Health Organization removed homosexuality from its list of mental illnesses in 1990; similarly, in 2018, transgenderism was also delisted as a mental disorder. This shift reflects a recognition of the stigma associated with such categorizations and their inconsistency with current medical knowledge (Czerwiec, 2021; Robles, et al., 2016). However, stigma persists, affecting both individuals and groups, often resulting in feelings of inferiority, social inadequacy, and a sense of a ‘wounded identity’. Stigmatized individuals may isolate themselves and encounter hostility, suspicion, and anxiety (Porankiewicz-Żukowska, 2013). Nonetheless, stigmatization and the formation of identity within such adverse circumstances can also serve as a catalyst for change. This change seems urgent, and the revision or deconstruction of legal systems is imperative to ensure the granting of necessary rights and adequate protection to LGBT+ groups.

## **2. Non-cis-heteronormativity and human rights**

Human rights are universal and inalienable, belong to every human being, and are linked to principles of equality before the law and equal political rights (Gawin et al., 2016). In this sense, every person possesses the ‘right to have rights’ by virtue of their inherent dignity. Despite this, the violation and deprivation of basic human rights, including in the form of discrimination, remain prevalent issues even in the 21st century, occurring when individuals from certain social groups face differential

treatment due to prejudice, despite no justifiable rationale. Simply their ‘otherness’ becomes the basis for unequal treatment (Czeszejko-Sochacka, 2019, p. 193).

The imperative to combat discrimination is evident in international law and EU regulations. While various existing international laws, such as the International Covenant on Civil and Political Rights (Art. 2 sec. 2), the International Covenant on Economic, Social and Cultural Rights (Art. 2 sec. 2), and the Convention for the Protection of Human Rights and Fundamental Freedoms (Art. 14), prohibit discriminatory practices, they often fail to explicitly address discrimination based on sexual orientation or gender identity. Responding to human rights violations against LGBT+ groups, the European Parliament condemned discrimination on these specific grounds (European Union Agency for Fundamental Rights, 2009, pp. 81–82).

The Yogyakarta document, formulated in Indonesia in 2006, provides a comprehensive definition of discrimination based on gender identity or sexual orientation. Its first principle emphasizes the universal right to the enjoyment of human rights, affirming that all individuals are born free and equal in dignity and rights. Discrimination, as elaborated in the second principle, consists of any differentiation, exclusion, limitation, or privilege based on sexual orientation or gender identity. Subsequent rules detail the rights derived from these foundational principles, including the right to legal personality, the right to life, personal security, privacy, and others. The document underscores that ensuring these rights is a responsibility of the state (Remin, 2009).

Since the Yogyakarta declaration, international forums like the UN General Assembly, the Council of Europe, and the European Parliament have advocated for the complete decriminalization of homosexuality and have condemned discrimination based on gender identity or sexual orientation (Council of Europe, 2010; European Parliament, 2011; European Parliament, 2023).<sup>2</sup> Despite lacking binding legal force, these resolutions, often referred to as ‘soft’ international law, represent a crucial advancement in protecting the rights of individuals facing discrimination on these grounds. They are also a manifestation of an evolving worldview adapting to changing social realities (Czeszejko-Sochacka, 2019, p. 199). Despite the global efforts, discrimination against sexual and gender minorities persists, even within the EU. Members of the LGBT+ community frequently face verbal, sexual, and physical aggression, as well as institutional bias, perpetuating multifaceted and multilevel social oppression which manifests through the reinforcement of cis-heteronormativity, heterosexism, homophobia, lesbophobia, transphobia, and various forms of hate crimes (Czeszejko-Sochacka, 2019).

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2 Additional insights into the criminalization of homosexuality can be obtained from the IGLA 2020 report (Botha et al., 2020). Homosexuality is still considered a crime punishable by death in 12 countries.

### 3. Problems of non-heteronormative people in Mexico and Poland: A comparative analysis

#### 3.1. The LGBT+ movement as a political actor in Mexico and Poland

Poland and Mexico, despite their different backgrounds, share a deeply rooted Catholic culture that has shaped their social codes and interactions for centuries (Amuchástegui et al., 2015; Eberts, 1998; Mach, 2007; Peralta, 2012; Porter-Szucs, 2011). Presently, despite the Church contending with liberal ideologies and experiencing a decline in adherents, government statistics indicate that a significant majority still identify as Catholics, comprising 78.6% of Mexicans (INEGI, 2020) and 71.45% of Poles (GUS, 2021). Catholicism as a (bio)power structure promotes a profoundly heteronormative and cisgender conception of social roles and human relations (Henshaw, 2014), championing patriarchy (Attoh, 2017) and obstructing initiatives related to sexualities (Barcenas, 2011; Korolczuk, 2020; Szwed & Zielińska, 2017; Żuk & Żuk, 2020). The cis-heteronormative paradigm has led to the growing exclusion of LGBT+ individuals in both Mexico and Poland. Fuelled by external progressive forces and internal impetus, these groups organize and advocate for their rights within antagonistic and inflexible national contexts. Understanding the rise of activism requires briefly tracing key historic landmarks that marked the LGBT+ movement in both countries.

Mexico's LGBT+ history can be divided into three large periods: pre-Hispanic, colonial, and post-independence. While pre-Hispanic times were not universally tolerant, some indigenous communities embraced non-heteronormative practices, even honouring 'Two-Spirit' or 'third-gender' identities, such as the *muxe* community in Juchitán de Zaragoza, Oaxaca (Mirandé, 2013). This cultural heritage and distinctiveness could have initially contributed to greater inclusion and diversity in Mexico, compared to Poland. During the colonial era, strict laws against sodomy were imposed, resulting in severe punishments, such as burning at the stake. In independent Mexico, despite the absence of the explicit criminalization of sodomy after the Napoleonic code was introduced by the French invasion in the 1860s, broad interpretations of 'public outrage against decency' (Maximilian I Penal Code, 1866, Art. 330 sec. 4) led to frequent repression of non-cis-heteronormative behaviours. Nevertheless, a homosexual subculture emerged in the late 19th century, especially in Mexico City, laying the foundation for the country's LGBT+ movement. The so-called Dance of the Forty-One in 1901 marked a significant and symbolic moment in Mexican history: forty-one men, some dressed in women's clothes, were arrested at a ball, symbolizing the repression of homosexuality (Franco, 2019). Throughout the 20th century, repression persisted alongside the growing collective action and expansion of non-governmental organizations (NGOs) (López, 2017, pp. 73–74). The establishment of the first NGO, the Homosexual Liberation Front, in 1971 marked a formal-

ization of the movement; six years later, Lesbos, the first lesbian organization, was founded. These groups, and members of the LGBT+ community, actively participated in key political events, such as supporting the 1968 student movement and the Cuban Revolution (Secretaría de Cultura, 2019). Through shared values extending beyond gender and sexuality, they forged alliances with left-wing parties, which integrated their causes into political agendas. The conservative centre-right Institutional Revolutionary Party, which ruled Mexico for over 70 years from 1929 to 2000,<sup>3</sup> also faced a growing imperative to co-opt LGBT+ groups. This was aimed at demonstrating the country's commitment to modernization (McGee & Kampwirth, 2015, p. 55), influenced by progressive legislative and judicial developments in the USA and Canada, the imperative for regional integration, and recommendations from the Inter-American Commission on Human Rights.

The greater formalization and politicization of the LGBT+ movement led to its increased visibility. The first LGBT+ Pride Parade in Mexico City in 1979 marked the beginning of a nationwide expansion (Secretaría de Cultura, 2019). Media representation addressing LGBT+ issues flourished, alongside the development of LGBT-friendly tourism (Bailey, 2022). Notable figures emerged in politics, including Patria Jiménez, the first openly lesbian Congress member, in 1997, and Amaranta Gómez Regalado, a transgender individual, in 2007. Acceptance of diverse gender identities and sexual orientations within political networks has grown, particularly since the left-wing Party of the Democratic Revolution began governing Mexico City in 1997 (López, 2017, p. 74). This trend intensified after 2018, with the National Regeneration Movement (Morena) gaining power and securing a parliamentary majority. Notably, in the 2021 parliamentary elections, a record-breaking 44 transgender individuals participated, with two transgender women securing seats in Congress for the first time (Infobae, 2022). These developments reflect the years of struggle of the Mexican LGBT+ movement and the profound legislative reconfigurations it has achieved, which will be further explored in the following section.

In contrast to Mexico, LGBT+ activism in Poland emerged later, and is typically traced back to the late 1980s or early 1990s (Bielska, 2018, p. 62; Lizurej, 2009, p. 1; Mizielińska, 2012, p. 288). Before this, a history of persecution prevailed, institutionalized through historical criminal codes under foreign occupation, the penalizing of same-sex relationships, and the association of homosexuality with paedophilia, zoophilia, and prostitution. Although consensual sexual relations between adult men

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3 The Institutional Revolutionary Party was founded as the National Revolutionary Party (Partido Nacional Revolucionario, PNR) in 1929. It was renamed the Party of the Mexican Revolution (Partido de la Revolución Mexicana, PRM) in 1938, and finally became the Institutional Revolutionary Party (Partido Revolucionario Institucional, PRI) in 1946.

were officially decriminalized in 1932, penalties could still be enforced under laws regarding homosexual prostitution until 1969 (Bielska, 2018, p. 60).

Key historical events, such as the persecution of homosexual men in Nazi concentration camps during World War II, have left a lasting impact on the group's collective memory (Plant, 2011). During the era of the People's Republic of Poland, LGBT+ individuals lived discreetly within small social circles, facing strict control and blackmail by security services and the militia. This era culminated in 'Operation Hyacinth' between 1985 and 1987, an initiative officially aimed at combating HIV/AIDS which primarily targeted homosexual men, resulting in massive arrests and the creation of thousands of personal registries known as 'Pink Files' (Bielska, 2018, pp. 63–64). While 'Operation Hyacinth' is seen by some as a catalyst for the LGBT+ community's awakening, others attribute the movement's dynamism to the fall of the Berlin Wall and the metaphorical 'pink curtain'. They argue that Poland's LGBT+ movement primarily arose due to external western influences rather than spontaneous genesis (Bielska, 2018, p. 59), in contrast to Mexico. In 1989, the Lambda Association became the first officially registered LGBT+ organization, later branching into independent entities across various cities. However, these initiatives were short-lived, reflecting what Bielska terms 'sinusoidal development' (2018, p. 145), marked by internal divisions. Lambda Warsaw was reactivated locally in 1997, retaining its status as the oldest operating LGBT+ organization. In 2001, the Campaign Against Homophobia (CAH), the second major institution, was established, but also faced internal division (Bielska, 2018, p. 150).

Since 2001, these organizations have focused on launching social campaigns to promote the coming-out process and organizing mass events such as Pride and Tolerance parades to increase the visibility of the LGBT+ community – despite frequent bans from local governments and opposition from conservative groups. However, this inclusive image has been mostly misleading, primarily representing gay interests with less attention given to lesbians, while excluding transgender issues and even stigmatizing bisexual individuals. Mizielińska attributes this to internal narrative inconsistencies stemming from the movement's inception, where Polish activists attempted to assimilate all western tendencies accomplished over more than three decades, leading to 'temporal disjunction and asynchrony' (2012, p. 290). CAH and Lambda Warsaw adopted a more inclusive, 'umbrella' approach to non-binary individuals relatively late, as reflected in their joint 2021 report (Kampania Przeciw Homofobii i Lambda Warszawa, 2021, p. 4). The establishment of the Trans-fuzja Foundation in 2008 marked the beginning of the Polish transgender movement.

The 'sinusoidal' development of LGBT+ engagement, marked by periods of progress followed by setbacks, limits its long-term impact on policymaking. Unlike in Mexico, there are no significant strategic alliances between the movement and leading political parties. Setbacks often coincide with periods of extreme-right rule by the Law and Justice (Prawo i Sprawiedliwość, PiS) party (in 2005–2007 and 2015–2023).

On the other side, left-wing parties have shown limited commitment to representing LGBT+ rights in their agendas (Lizurej, 2009, p. 2), focusing more on women's rights and abortion. Given the fragmentary development and setbacks at the political level, Polish movements have looked to external forces to support their quest for rights. Increased exposure to western culture, due to open borders and the need to align with its standards, have indeed challenged cis-heteronormative worldviews. As a member of the EU, Poland is bound by its directives, laws, and values. EU institutions explicitly recognize LGBT+ rights as human rights and lead by example in their protection, applying pressure through soft and hard power mechanisms, such as withholding funding, initiating infringement processes, and employing discursive and reputational tactics, like putting Poland at the bottom of the 'rainbow ranking'.<sup>4</sup>

However, the impact of supranational EU law remains limited, as policies concerning family matters fall within national competence, and EU rules apply primarily in cross-border cases. While Article 21 of the Charter of Fundamental Rights explicitly prohibits discrimination based on sexual orientation, and Directive 2000/78/EC (European Parliament, 2000) extends this prohibition to the workplace, specific protections for transgender and intersex individuals are still lacking, despite some directives attempting to broaden the spectrum of discrimination to cover gender reassignment and gender identity and expression (European Parliament, 2006; European Parliament, 2012). Despite amending its Labour Code in 2003 to comply with EU requirements and enacting a law on the implementation of certain EU provisions on equal treatment in 2010, Poland has not only largely failed to align with EU standards but has also obstructed significant supranational initiatives. For instance, on 9 June 2023, as announced on social media by politicians Sebastian Kaleta and Zbigniew Ziobro, Poland vetoed an EU statement on LGBT+ safety and opposed an EU directive on violence against women, citing concerns about prioritizing LGBT+ rights over others and rejecting the use of the term 'gender' in EU documents (Ministerstwo Sprawiedliwości, 2023).

### **3.2 Questioning cis-heteronormative legal frameworks: Diverging experiences in Mexico and Poland**

This section offers detailed insights into the rights of LGBT+ communities in Mexico and Poland. We begin by examining how discrimination is conceptualized in legal frameworks, including national constitutions. Secondly, we delve into family-related rights, encompassing civil partnerships, same-sex marriage, and adoption, and their potential to challenge heteronormative orders. Thirdly, we assess whether laws enabling gender-identity changes on official documents contest cis-normativity, and we explore whether rights for these groups expand into other areas. In the final

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<sup>4</sup> Data of the ILGA 2023 Rainbow Europe Map and Index are available at <https://www.ilga-europe.org/report/rainbow-europe-2023/>.

part of this section, we contrast the initiatives undertaken by Poland and Mexico to protect LGBT+ minorities via penal codes, with a specific focus on the combatting of hate crimes related to gender and sexual preferences.

The rights of LGBT+ people in Mexico have been significantly strengthened over the last two decades. In 2001, Article 1 of the Mexican Constitution was amended to explicitly introduce protection against gender-based discrimination (Diario Oficial de la Federación, 2001). In 2003, the Federal Law to Prevent and Eliminate Discrimination (Cámara de Diputados, 2003) was enacted to prohibit any discriminatory practices related to gender or sexual orientation, also establishing the National Council to Prevent Discrimination as the institution responsible for overseeing its implementation and serving as the governing body for public policies. Over time, the law has been strengthened to encompass various forms of discrimination, including direct, indirect, structural, and associative discrimination, and to explicitly address homophobia and misogyny.<sup>5</sup> Between 2004 and 2017, all the states enacted their own local antidiscrimination acts, including for gender and sexual bias, with some extending the scope of prohibited behaviours beyond homophobia to also include lesbophobia, biphobia, and transphobia.<sup>6</sup> In 2011, Article 1 of the Mexican Constitution underwent another significant amendment (Diario Oficial de la Federación, 2011); this revision acknowledged that all individuals are entitled to the human rights recognized not only within the Constitution itself but also in the international treaties to which Mexico is a party. Additionally, the broad concept of ‘preferences’ previously included in Article 1 was refined to specifically address ‘sexual preferences’.

In contrast, in Poland, no constitutional amendments have been pursued to ban discrimination based on sexual preferences or gender. However, according to Bielska, ‘[t]he Polish LGBT+ movement does not strive to achieve this goal at all’ (2018, p. 188). Although discrimination is prohibited for any reason, and men and women are entitled to equal rights (Arts. 32 and 33 of the Polish Constitution), the Constitution still explicitly promotes a cis-heteronormative, Christian order. It refers to religious values, with a direct reference to God ‘as a source of truth, justice, goodness, and beauty’ in its preamble, and defines marriage as a union between a man and a woman (Art. 18). Poland’s national antidiscrimination law, known as the Law on Implementation of Certain EU Provisions Regarding Equal Treatment (2010), is generally less detailed compared to Mexico’s FLPED. It prohibits direct and indirect discrimination based on sexual orientation or gender, mainly targeting LGB groups and women, and

5 Direct discrimination means less favourable treatment based on prohibited grounds; indirect discrimination refers to neutral practices disadvantaging specific groups; structural discrimination refers to systemic norms and behaviours causing exclusion; associative discrimination is discrimination due to association with a protected group (definitions from the Federal Law to Prevent and Eliminate Discrimination, 2003, p. 2).

6 Local antidiscrimination laws in Oaxaca and Mexico City.

primarily focusing on economic rights. A recent proposal in 2022 by a left-wing party aimed to extend this law to cover all LGBT+ groups, including transgender individuals, by incorporating gender identity and expression and broadening the definition of discrimination (Sejm, 2022). However, the draft did not even receive a parliamentary number, suggesting limited support.

Mexico has made significant strides in improving the legal possibilities for LGBT+ people to form a family. An important milestone occurred in 2006 when the Law on Civil Partnership (Asamblea Legislativa del Distrito Federal, 2006) was approved in the Federal District (now Mexico City). However, it still differentiated between heteronormative and other types of unions, leaving same-sex couples without the same access to social protection and inheritance processes (Reyes & Rosado, 2022, p. 13). A transformative moment took place in December 2009 when, for the first time in any Latin American jurisdiction, the legalization of same-sex marriage was established through the reform of Article 146 of the Civil Code of the Federal District (GODF, 2009); the decree established that marriage would be the 'free union between two persons'. Consequently, Article 391 was also reformed to enable same-sex couples to adopt. The 2015 ruling of the Mexican Supreme Court (Suprema Corte de Justicia de la Nación, SCJN), a pivotal institution in driving judicial and legislative change for LGBT+ rights, played a crucial role by establishing jurisprudence for equal marriage nationwide, deeming state laws that limit marriage to heterosexual unions as unconstitutional (Judgment of the Mexican Supreme Court, 2015).

Despite this landmark ruling, many local governments exhibited institutional resistance to non-heteronormative ideas for years (López, 2017, pp. 79–82). It took over a decade for all the remaining 31 states to align and amend their civil codes to allow for equal marriage, with Tamaulipas being the last to approve such unions in 2022. Notably, only nine states enabled adoption by same-sex couples between 2014 and 2022 (García, 2023). In 2017 and 2019, two groundbreaking rulings affirmed the rights of same-sex couples to family life, including various forms of adoption and the right to register one's partner's children to protect their best interests (Judgments of the Mexican Supreme Court, 2017 & 2019). Despite resistance, as seen in the case of same-sex marriage, further standardization of local laws can be expected.

In Poland, the landscape regarding family rights is one of the least progressive in the EU. Currently, there is no legislation allowing same-sex couples to formalize their relationship and acquire the associated rights. This gap is a key point of contention for LGBT+ collective action (Bielska, 2018, p. 189), as evidenced by multiple law proposals. Nine projects for civil partnerships and civil partnership agreements have been submitted but subsequently rejected or have been stalled in legislative limbo, beginning with a pioneering draft by Senator Szyszkowska from the Democratic Left Alliance and Labour Union (SLD-UP) coalition in 2003. The initial project, while significant, had limited scope, focusing only on joint ownership, inheritance procedures, and tax exemptions on inheritances and donations (Senat, 2003); it excluded

all other rights granted in heteronormative marriages. Subsequent projects submitted in 2011 (by the SLD), 2012 (by the Palikot Movement/SLD and by Civic Platform), and 2013 (by the SLD and the Palikot Movement) attempted to fill various gaps but failed to grant all the rights (Sejm, 2011; 2012a; 2012d; 2012e; 2013b; 2013c). The first more comprehensive proposals came from the Nowoczesna party in 2018 and from the left-wing coalition (KL) in 2020 (Sejm, 2018; Sejm, 2020a). Both granted rights to changing surnames, joint ownership, joint tax filing, inheritance procedures (including tax exemptions), burial rights for the partner, survivor's pensions, caregiving allowances, access to health information, and limited adoption rights (restricted to child recognition). This last aspect is particularly contentious in Poland, as only a small percentage of the public (6–8%) accepts the idea of adoption by same-sex couples (Bielska, 2018, p. 196). As of now, only one proposal for same-sex marriage has been presented, in 2020, by Anna M. Żukowska (from the KL), defining marriage as a union between 'two persons of different or the same sex' and proposing necessary changes in other Polish laws accordingly (Sejm, 2020b).

The advancement toward a more non-binary societal structure and the broader inclusion of diverse transgender groups has been notable in Mexico in recent years. As with other laws, the capital city led the way in this progress by amending Article 135 of its Civil Code, simplifying the process of changing gender identity on birth certificates and other official documents. This amendment replaced the previous judicial process with a straightforward administrative procedure. This pioneering law set a precedent for similar changes in 17 states between 2017 and 2022. However, these measures had limits and initially excluded transgender minors, despite evidence from a 2018 government survey indicating that a significant proportion of transgender individuals (39.2%) recognize their gender identity as early as childhood (ENDOSIG, 2018, p. 4). The SCJN's ruling in 2022 declared age limits for gender-identity recognition unconstitutional (SCJN, 2022). However, only a few states have since implemented procedures to accommodate transgender minors: Mexico City adopted a decree in 2021, and corresponding laws were enacted in Jalisco (2020), Oaxaca, Morelos (2021), and Sinaloa (2022), typically allowing children above 12 years old to access such administrative processes. However, a significant milestone occurred in Salto, Jalisco, where the first gender recognition was granted to a 5-year-old transgender boy (Milenio, 2022).

These laws, however, only cater to individuals identifying within the binary gender framework as either male or female, thereby excluding non-binary, genderfluid, agender, and other groups. Responding to pressures from the LGBT+ and queer movements, recent initiatives led by the leftist Morena party, currently in power, have included the proposal in 2023 of a non-binary law (*Ley No-binaria*) for Mexico City. This legislation would enable transgender individuals to change their gender identity on birth certificates from the age of 12 and register it as non-binary. Emphasizing self-perceived gender identity, gender expression, and inclusive language, this

initiative reflects a broader societal shift. Additionally, Morena politicians suggested several amendments to the Federal Civil Code in 2020, along with a proposal in 2022 to amend Article 11 of the Mexican Constitution to recognize the rights of non-binary individuals.

In Poland, there is currently no explicit provision in the law recognizing the right to change gender identity on official documents. While legal gender change is indeed possible, the procedures involved are notably complex. According to Grzyb, ‘in accordance with the model established in the jurisprudence of the Supreme Court, a transsexual person can seek a change of gender before a district court, based on Article 189 of the Code of Civil Procedure, simultaneously suing their parents’ (2022, p. 260). Additionally, this process requires the applicant to undergo a ‘real-life test’ and a psychiatric diagnosis. The Trans-fuzja Foundation has long advocated for legislation to regulate and simplify the process of changing gender identity (Bielska, 2018, p. 189). A proposal for such a law, known as the Act on Gender Recognition, was submitted in 2013 by Anna Grodzka (from the Palikot Movement), the first openly transgender person in the Polish parliament. However, unlike its Mexican counterpart, this draft aimed to simplify and standardize the procedure, without replacing the judicial process with an administrative one. Under this proposed law, court rulings would serve as the basis for issuing new birth certificates for individuals over 16 years old, subject to certain conditions, such as a statement about their gender identity, along with medical assessments confirming the persistent difference between gender identity and assigned sex (Sejm, 2013a). The proposal was vetoed by the president in 2015 and now remains in a legislative vacuum.

In addition to recognizing fundamental rights for LGBT+ individuals, it is also crucial to address their protection under the law. These groups continue to experience crimes and persecution based on their sexual orientation or gender identity or its expression. Physical and verbal attacks against LGBT+ individuals remain common in both Mexico and Poland. However, comparing statistics is challenging, due to differences in measurement methodologies and varying levels of general violence and homicide in each country.

The increasingly rich catalogue of rights and the greater visibility of non-cis-heteronormative communities in Mexico has turned out to be something that is still very difficult to accept in its conservative, Catholic, macho culture. It can be argued that in Mexican society, there is a noticeable inconsistency in the interplay of law, cultural norms, and social attitudes toward LGBT+ people. Despite their very high legal recognition, homophobia and transphobia persist. According to a government survey (ENDOSIG, 2018, p. 7), 62% of respondents who identify as LGBT+ faced verbal abuse, while 18.2% experienced physical violence and 9.7% suffered sexual attacks, all within their neighbourhood. However, in Mexico, which has one of the highest homicide rates, hate crimes can go beyond verbal, sexual, or minor physical assaults and culminate in murder. As reported by the Mexican NGO LetraEse (2020,

pp. 8–11), more than half of the victims of fatal violence against the LGBT+ community are transgender women (54.5%), followed by 28% gay individuals. Between 2016 and 2020, at least 459 non-cis-heteronormative people were murdered in Mexico, with the majority being transgender (*trans homicidio*). According to the Trans Murder Monitoring project, the country currently ranks second in Latin America and globally, after Brazil, in terms of LGBT+ murders (Transrespect versus Transphobia Worldwide, n.d.).

In Poland, murders are not a statistically significant problem, partly due to very low homicide rates (World Bank, n.d.); against this backdrop, the Trans Murder Monitoring project reported only one trans murder case, in 2011 (Transrespect versus Transphobia Worldwide, n.d.). However, according to the Lambda/CAH report, in 2019–2020, 53% of respondents belonging to the LGBT+ community experienced hate crimes, with 59% of them facing verbal violence, 36% facing threats, 14% experiencing physical violence, and 22% sexual violence (Kampania Przeciw Homofobii/ Lambda Warszawa, 2021, pp. 30–33).

The above highlights the serious need to reform the penal codes in both countries. Currently, despite high levels of homicide, only 12 states in Mexico have specific laws addressing aggression or homicides against the LGBT+ community (Cámara de Diputados, 2022). Amendments in 2013 to Articles 209 and 306 of the Federal Penal Code increased penalties for injuries and homicides based on the victim's sexual orientation or gender identity, ranging from 30 to 60 years of imprisonment. Subsequent changes to Article 303 of the Code in 2021 defined hate crimes, and those to Article 209 in 2024 prohibited involuntary conversion therapies. However, serious shortcomings in the Mexican justice system, including high rates of corruption and impunity, hinder the enforcement of these laws (Fuentes et al., 2023).

In Polish law, hate crimes based on gender or sexual preference are not given adequate consideration. Despite three proposals in 2012 to amend Articles 119, 256, and 257 of the Penal Code to include penalties for such crimes, they have not been enacted and remain in a legal vacuum (Sejm, 2012b; 2012c; 2012f). Consequently, the Polish Penal Code lacks specific provisions related to gender or sexual orientation. This gap is concerning, especially given the findings from the Lambda/CAH report (Kampania Przeciw Homofobii/Lambda Warszawa, 2021) and the presence of hate speech at various levels, including in influential NGOs like Ordo Iuris, youth organizations like All-Polish Youth, and political figures belonging to extreme-right and ultranationalist factions. Even more concerning is the use of openly hateful rhetoric by Judge Krystyna Pawłowicz of the Constitutional Tribunal in her frequent declarations in the press and on social media. The increasing number of local governments declaring themselves 'LGBT-free zones' since 2019 further institutionalizes and normalizes, in a Foucauldian way, hate and exclusion. These developments have faced strong opposition from the European Parliament, which responded by declaring the entire EU a 'LGBTIQ Freedom Zone' in 2021 (European Parliament, 2021).

## Concluding remarks

In light of the contrasting legal landscapes and societal attitudes toward LGBT+ rights in Mexico and Poland, it becomes clear that the journey toward equality and acceptance is multifaceted and complex. Mexico has witnessed significant advancements in federal and state laws, demonstrating an increasing recognition of non-binary perspectives and the inclusion of transgender children and youth. Conversely, Poland has seen minimal legal progress, with the continuous rejection of proposals aimed at challenging heteronormative rather than cis-normative orders. However, both countries grapple with their own structural challenges. In Mexico, despite very progressive laws, the LGBT+ community remains at high risk of hate crimes and homicide, highlighting the need for further improvements in the system of justice. In Poland, the example of Mexico underscores the importance of strategic alliances between the government and the LGBT+ movement and the necessity of integrating LGBT+ claims into political agendas, especially by pro-European parties. Now that the left-wing coalition has secured a parliamentary majority and several groups are resuming reform projects abandoned during PiS's rule, it is time to embark on a more steadfast path to break the cyclical nature of the LGBT+ movement's progress in Poland and begin, without further setbacks, to have a longer-term impact on the policy-making process in the country. In this scenario, education emerges as a fundamental tool in dismantling the rigidities of cis-heteronormative social structures that have long shaped human relations. By fostering greater awareness, visibility, and understanding, both Mexico and Poland can pave the way for more inclusive societies.

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## The Evolution of Same-Sex Marriage Case Law in Europe<sup>1</sup>

**Abstract:** The number of countries allowing same-sex marriage is gradually increasing. Currently, 37 countries have laws regulating same-sex marriages, specifying their status and/or the possibility of adopting children. These solutions counter discrimination against same-sex couples and are part of the

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protection of human rights. Against the background of other countries, the pan-European tendency to accept the institution of same-sex marriage is garnering positive attention, although it is still controversial in some countries. Regulations of European law and the case law of the Court of Justice of the European Union, the European Court of Human Rights and the constitutional courts, which play an essential role in anti-discrimination measures and are in favour of respecting human rights, provide crucial support. This article discusses the evolution of the jurisprudence of the ECtHR, the CJEU and the national courts of selected countries (Slovenia, Spain, Portugal, Germany and Austria) concerning same-sex marriage. It highlights how recognising the right to same-sex marriage does not come at the expense of the rights of others or the public interest.

**Keywords:** right to marry, same-sex marriage, case law, ECtHR, CJEU

## Introduction

The institutionalisation of non-heteronormative forms of cohabitation shows great dynamism and is the subject of social and political debate in most states of the European Union (Caprinali et al., 2023; Fuchs & Boele-Woelki, 2017; Hamilton & Noto la Diega, 2020; Szczerba-Zawada 2019). Since the beginning of the 21st century, an increasing number of countries have enacted legislation regulating same-sex relationships by defining the status of the relationships, the rights and duties of the partners or the possibility of adopting children (Digoix, 2020; Kużelewska, 2019). This represents a positive step forward in the fight against discrimination. Despite the controversy that still surrounds it (Kużelewska & Michalczuk-Wlizło, 2021), there is a pan-European trend towards acceptance of the institution of same-sex marriage (Bolzonaro, 2023). Therefore European law regulations and the case law of the Court of Justice of the European Union (CJEU), the European Court of Human Rights (ECtHR) (Johnson, 2013) and constitutional courts play an essential role in anti-discrimination measures (Gallo et al., 2014).

This article aims to discuss the evolution of the case law of the ECtHR (Kovacic Markic, 2020), CJEU, and constitutional courts regarding same-sex marriage. It discusses the role European courts have played in this field and how their case law has developed. It will verify the research hypothesis on the consistency of the jurisdiction of the ECtHR, CJEU and selected constitutional courts; in general, we observe a significant tendency towards recognising same-sex marriages. Comparative and legal analysis methods will help achieve this aim. The paper is composed of three sections: section one examines the development of the ECtHR's case law on granting same-sex couples the right to marry, starting from the heteronormative view of marriage outlined in the last decades of the 20th century to the positive obligation of states to ensure the legal recognition and protection of same-sex partnerships through a specific legal framework. Section two analyses the evolution of the case law of the CJEU regarding the protection of the right of same-sex couples to enter into civil unions or get married. Section three is a brief country report devoted to the case law of selected constitutional courts in European states, namely Slovenia, Spain, Portugal, Germany

and Austria. The choice of these states is based on the fact that they are recognised as leading constitutional jurisdictions in Europe regarding same-sex marriage in particular. The principle of dynamic interpretation of constitutional provisions is most frequently adopted in these courts (Dzehtsiarou & O'Mahony, 2023).

## **1. The European Court of Human Rights and the right to marry for same-sex couples**

The European Convention on Human Rights (ECHR) safeguards the right to marry under Article 12: 'Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.' This fundamental human right aims to protect citizens against government interference in their marital and family life (Van der Sloot, 2014, p. 398). In contrast to other articles of the Convention, Article 12 refers only to men and women. Initially, this led the ECtHR to a more conservative interpretation, relying primarily on textual and historical reading, which resulted in the denial of its applicability to same-sex couples (Willems, 2022, p. 5). In its subsequent case law, the Court considered, in light of Article 9 of the Charter of Fundamental Rights of the European Union (European Union, 2016), that the right to marry can no longer be limited to persons of the opposite sex in all circumstances (in *Schalk and Kopf v. Austria*, Judgment of the ECtHR, 2010, § 61).<sup>2</sup> However, in the absence of a European consensus, the right enshrined in Article 12 is still not recognised for same-sex couples (Shahid, 2017, p. 186). Strongly relying on this insufficient consensus, the Court has found itself in a somewhat conflicted position: it allows a rather wide margin of appreciation, which self-limits judicial activism and thus preserves its authority in (particularly conservative) Member States,<sup>3</sup> while at the same time it perpetuates unequal treatment of marginalised groups and thereby undermines its legitimacy as the guardian of Convention rights (Fenwick, 2016, p. 45; Shahid, 2017, pp. 195–196).

### **1.1 The ECtHR's early case law: A heteronormative approach to the meaning of Article 12**

The ECtHR had a heteronormative approach to interpreting Article 12 of the ECHR in the 1980s and 1990s regarding the right of transsexual people to marry (Johnson & Falcetta, 2018, p. 6). In the case of *Rees v. the United Kingdom* (1986), the

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- 2 Article 9 of the Charter states: 'The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.' Thus, to broaden its scope, Article 9 deliberately guarantees the right to marry without referring to men and women (Willems, 2022, p. 6).
  - 3 The ECtHR faces some resistance from (certain) Member States in implementing its judgments and sufficiently guaranteeing Convention rights (Shahid, 2017, p. 195).

Court, relying primarily on textual interpretation, held that the right provided for in Article 12 protects traditional marriage between persons of the opposite biological sex. Moreover, marriage is protected in recognition that it is the foundation of the family. The ECtHR has noted that while exercising the right to marry is subject to national laws, possible restrictions must not affect its very essence (*Rees*, § 49–50). The same principle was upheld in the case of *Cossey v. the United Kingdom* (1990), where the Court held that the biological definition of an individual's sex for marriage aligns with the traditional interpretation of Article 12 (§ 46).

This stance was rejected in the renowned case of *Goodwin v. the United Kingdom* (Judgment of the ECtHR, 2002). Firstly, the ECtHR held that procreation is not a necessary condition for a couple's fundamental right to marry; the inability of any couple to conceive a child cannot be a reason *per se* for denying a couple such a right. Given the significant social changes that have taken place in the marital sphere, solely biological criteria for assessing an individual's gender are no longer appropriate (*Goodwin*, § 98 and § 100). The underlying doubt, which the reasoning (un)willingly implies, persists: if reproduction is not a constitutive element of marriage, why should same-sex couples be denied this right (Novak et al., 2019, p. 38)?<sup>4</sup>

## 1.2 The evolution of same-sex marriage after 2010: Relying on the lack of European consensus

The core issue addressed in this section, whether the right to marry is available to same-sex couples, was considered by the ECtHR for the first time in the case of *Schalk and Kopf* (Kogovšek Šalamon, 2016, p. 1074). The state did not permit the applicants (two men) to marry, so they alleged a violation of Article 12 of the ECHR (*Schalk and Kopf*, § 39). The Court held that the wording of Article 12 must be regarded as deliberate, given that all other substantive articles of the Convention grant rights and freedoms to 'everyone' or 'no one'.<sup>5</sup> Furthermore, in the 1950s, when the ECHR was adopted, marriage was understood in the traditional sense as a union between partners of different sexes (*Schalk and Kopf*, § 55). Accepting the applicants' argument that the Convention is a living instrument to be interpreted in the light of present-day conditions, the ECtHR acknowledged that the institution of marriage develops with the evolution of society. Therefore, regarding Article 9 of the Charter, the right enshrined in Article 12 cannot in all circumstances be limited to

<sup>4</sup> This stance was, however, rejected by the Court in *Schalk and Kopf*. In the Court's view, the finding that procreation is not a fundamental element of marriage does not allow any conclusion regarding the issue of same-sex marriage (§ 56).

<sup>5</sup> According to some authors, the ECtHR overlooked the fact that Article 12 was inspired by Article 16 of the Universal Declaration of Human Rights (UDHR; United Nations, 1948), which also provides for the right of men and women to marry. The purpose pursued by the UDHR, however, was not to exclude same-sex couples from exercising this right but to provide adequate protection for women, recognising them as equals (Van der Sloot, 2014, pp. 400–403).

opposite-sex couples (*Schalk and Kopf*, § 57 and § 61).<sup>6</sup> However, as it stated, the Court should not rush to judgment, as it has not found a European consensus on the subject of same-sex marriage.<sup>7</sup> National authorities are, therefore, best placed to assess and respond to the needs of each society. In its ruling, the ECtHR emphasised that Article 12 does not obligate Member States to recognise same-sex marriages (*Schalk and Kopf*, § 58 and § 62–63).<sup>8</sup>

Moreover, in *Schalk and Kopf* the applicants alleged a violation of Article 14 (prohibition of discrimination) taken in conjunction with Article 8 (right to respect for private and family life), as Austria did not provide for any other form of legal recognition of their union (§ 65).<sup>9</sup> In this respect, the Court went a significant step further and wrote that same-sex couples living in stable de facto partnerships enjoy protection not only in terms of ‘private’ but also ‘family’ life, enshrined in Article 8 of the Convention (§ 94–95). It supported a European trend towards the recognition of same-sex relationships (Ammaturo, 2014, pp. 178–179; Crisafulli, 2014, p. 418; Radonjić, 2023, p. 84; Waaldijk, 2021, p. 468). However, the ECtHR did not go so far as to limit the wide margin of appreciation given to Member States at the time: they were still free to decide on the timing and scope of legal recognition of same-sex unions (*Schalk and Kopf*, § 105 and § 108).

In the subsequent case of *Vallianatos and Others v. Greece* (2013), the Court recognised a violation of Article 14, read in conjunction with Article 8, because Greece had introduced, in addition to marriage, civil unions available only to opposite-sex partners. By excluding same-sex couples, the ECtHR noted, the law discriminated based on sexual orientation (*Vallianatos*, § 79).<sup>10</sup> Somewhat surprisingly, since it could not rely on a European consensus, the Court settled for the emerging trend towards the introduction of legal recognition of same-sex relationships.<sup>11</sup> Although

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6 Unfortunately, the ECtHR did not clarify what such circumstances are (Shahid, 2017, p. 186).

7 At the time of the judgment in *Schalk and Kopf*, same-sex marriage was permitted in 6 out of the 47 Member States (*Schalk and Kopf*, § 27). The Court’s reliance on (the lack of) European consensus and the resulting wide margin of appreciation enjoyed by Member States is criticised as unclear and inconsistent – even more so as the ECtHR does not consequently inspect States’ justifications for limiting marriage to persons of the opposite sex (Hamilton, 2013, p. 7).

8 In the Court’s view, Article 14 (prohibition of discrimination) in conjunction with Article 8 (right to respect for private and family life), a provision of more general purpose and scope, cannot be interpreted as conferring the right to marry on same-sex couples either.

9 In 2010 Austria introduced a law recognising same-sex unions. The ECtHR thus considered only whether this should have been done beforehand (*Schalk and Kopf*, § 103–104).

10 To reinforce its position, the Court held that same-sex couples would have a particular interest in entering into such a union as it would provide them with the sole basis on which to have their relationship legally recognised (*Vallianatos*, § 90).

11 At the time of the *Vallianatos* judgment, 19 Member States of the Council of Europe authorised some form of registered partnership other than marriage. However, only Greece and Lithuania reserved this alternative to marriage for heterosexual couples (*Vallianatos*, § 91).

a step forward, the case in question did not change the Court's heteronormative understanding of marriage (Shahid, 2017, p. 187). In the case of *Hämäläinen v. Finland* (2014), the ECtHR was tasked with ruling on whether a requirement that legal recognition of changed gender be conditional on converting a previously contracted marriage into a registered partnership was in line with the Convention standards in Articles 8, 12 and 14; Finland allowed marriage only between persons of the opposite sex (*Hämäläinen*, § 24 and § 29). The Grand Chamber reaffirmed the stance taken in *Schalk and Kopf*, which stated that in the absence of a European consensus on same-sex marriage and given the sensitive moral and ethical dilemmas involved, Member States are granted a wide margin of appreciation (*Hämäläinen*, § 75). The Court further emphasised that Article 12 as a *lex specialis* protects the traditional concept of marriage; it does not impose an obligation to extend this right to same-sex couples (Johnson & Falcetta, 2018, p. 10).<sup>12</sup> The ECtHR determined that the differences between registered partnerships and marriage would not bring about any fundamental changes in the applicant's legal situation, and therefore it found no violation of the ECHR (Fenwick, 2016, p. 13).

In the case of *Oliari and Others v. Italy* (2015), three same-sex couples claimed that Italy breached Article 14 in conjunction with Article 12 by not allowing them to marry. However, this part of their application was rejected as manifestly ill-founded (§ 193–194; for more on this, see Fenwick, 2016, p. 11). While the Court recognised a gradual development in allowing same-sex couples to marry, with 11 Member States of the Council of Europe granting such rights at the time, it still held on to its view from *Schalk and Kopf* and *Hämäläinen* (*Oliari*, § 191–192). In *Chapin and Charpentier v. France* (2016), the application of Article 12 was again reaffirmed. However, the complaint that alleged a violation of the same-sex couple's right to marry was rejected without restraints. The ECtHR held that not enough time had passed since the earlier cases for it to reach a different conclusion (*Chapin and Charpentier*, § 31–32 and § 39–40).<sup>13</sup> In the case in question, the Court also considered whether France had violated Articles 8 and 14; by denying same-sex couples the right to marry, the level of legal protection otherwise afforded by civil partnerships was inferior. The Court ruled that states enjoy a certain margin of appreciation regarding the legal safeguard-

12 Initially the applicant did not invoke Article 12 of the ECHR; it was the ECtHR that included it in its consideration. Some authors consider this to be equivocal at least, since the Court merely reiterated its position that Article 12 does not impose an obligation to recognise same-sex marriages. Once again, this reinforced the heteronormative approach to Article 12 (Johnson & Falcetta, 2018, p. 13; Shahid, 2017, p. 190).

13 In 2013, France allowed same-sex partners to marry; the ECtHR acknowledged this when ruling on an alleged violation of Article 14 taken in conjunction with Article 12, as the applicants were free to marry. However, some scholars argue that the reasoning could have been reversed: by changing its laws, France admitted a previous wrong practice. As in some other cases, the ECtHR could have held this against it (Shahid, 2017, p. 192).

ing of same-sex relationships, and since France appeared to have followed trends observed in other Member States, it did not overstep its discretion (*Chapin and Charpentier*, § 48–51).

### **1.3 Legal recognition of same-sex relationships: The state's positive obligation**

Although in *Oliari* the interpretation of Article 12 remained heteronormative and thus unchanged, the Court nonetheless took a significant step forward in providing the necessary legal recognition and protection for same-sex unions. By failing to provide a legal framework for same-sex partnerships, apart from marriage which was reserved for heterosexual couples, Italy breached its positive obligation under Article 8 of the Convention (*Oliari*, § 185). In determining the state's margin of appreciation, the Court considered the importance of legal recognition for an individual's existence and identity and the rapid evolution of a European (and global) consensus on legislative protection of same-sex relationships.<sup>14</sup> In addition, the ECtHR attributed importance to public support for and acceptance of same-sex couples in society. The need to regulate such unions had been persistently reiterated by Italy's highest judiciary, which did not go unnoticed by the Court (*Oliari*, § 179–180). However, reliance on the 'internal' consensus was heavily criticised in the literature (see Ziyadov, 2019).<sup>15</sup> The ECtHR noted a fundamental gap between the social reality of the applicants, who lived their relationships openly, and the law, which granted them no recognition. The obligation to provide for the legal recognition of same-sex couples would not, in the eyes of the Court, amount to any particular burden on the state but would serve an essential social need (*Oliari*, § 173). *Oliari* showed a further step in the strengthening of the rights of same-sex persons under the ECHR (D'Amico & Nardocci, 2017, p. 173).

The heteronormative interpretation of Article 12 remains intact even in present-day case law.<sup>16</sup> Contrary to the lack of progress regarding the right to marry for same-sex couples, the Court has further elaborated its understanding of the posi-

14 At the time, 24 out of 47 Member States of the Council of Europe had legislated for some form of recognition and protection in favour of same-sex couples (a 'thin majority'). The ECtHR considered the global trend as well, specifically mentioning the decision of the Supreme Court of the United States of America in the case of *Obergefell et al. v. Hodges, Director, Ohio Department of Health et al.* in 2015 (*Oliari*, § 65 and § 178).

15 The doctrine of European consensus already lacks clarity, thereby deviation from generally applicable models of this consensus is particularly problematic. Reliance on national consensus could also delay the overcoming of discrimination against same-sex couples (Fenwick, 2016, pp. 24–25). In addition, criticism of the European consensus doctrine addresses the Court's inconsistency when outlining the factors on which the width of the margin of appreciation is determined (Ziyadov, 2019, p. 645).

16 This is even more so as the ECtHR dismissed the application in the case of *Fedotova and Others v. Russia* (2023), which alleged (among other things) the violation of Article 12 as manifestly ill-founded (§ 82).

tive obligation to recognise and protect such relationships under Article 8. In January 2023, the Grand Chamber delivered its judgment in the case of *Fedotova and Others v. Russia*, holding that the trend towards legal recognition of same-sex partnerships, which the Court had followed in its past case law, is now confirmed, with 30 Member States of the Council of Europe regulating these unions (either by allowing same-sex marriage or by providing legal protection in various forms of civil or registered partnerships) (§ 175).<sup>17</sup> As a result, the state parties to the Convention are required to provide for a legal framework that ensures recognition and adequate protection to same-sex couples.<sup>18</sup> Only through such an interpretation of Article 8 of the ECHR can the right to private and family life for homosexual persons be effectively protected. Moreover, such an understanding of this right is consistent with the principles of a democratic society – pluralism, tolerance, broadmindedness – as guaranteed by the Convention. Legal recognition and protection confer legitimacy on same-sex couples and promote their inclusion in society (*Fedotova*, § 178–180).

In waiving its positive obligation, Russia referred to the protection of the traditional family, respect for the negative feelings of the majority of the Russian population towards same-sex relationships, and the protection of minors from the promotion of homosexuality.<sup>19</sup> All of these were rejected by the ECtHR, mainly because traditions, stereotypes and prevailing social attitudes in a particular country cannot justify differential treatment based on sexual orientation; the rights of minority groups cannot be subject to the acceptance of the majority (*Fedotova*, § 206–222).<sup>20</sup> Finally, the Court held that states enjoy a wider margin of appreciation for the form and content of such recognition and protection. The Court has not specified whether the legal framework needs to take the form of a registered partnership or civil union (Waaldijk, 2024). However, since Convention rights are not merely theoretical and illusory but practical and effective, the legal framework must provide same-sex couples with aspects integral to their life as a couple (*Fedotova*, § 189–190). The ECtHR confirmed the standards established in *Fedotova* in three subsequent cases: *Buhceanu and Others v. Romania* (2023), *Maymulakhin and Markiv v. Ukraine* (2023)

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- 17 The Court referred to different bodies of the Council of Europe that have stated that legal protection and recognition of same-sex unions is essential. It also considered international developments, including the Advisory Opinion no. OC-24/17 of the Inter-American Court of Human Rights (*Fedotova*, § 177). It should be noted that as of 16 March 2022, Russia is no longer a member of the Council of Europe nor a contracting party to the ECHR. As the applications in question were lodged before 16 September 2022, the ECtHR still had jurisdiction to deal with them.
- 18 According to the Court's ruling, the margin of appreciation afforded to states is considerably reduced, due to the European consensus and the aspects essential to the individual's personal and social identity (*Fedotova*, § 187).
- 19 It is important to note that Russia relied on the judgment in *Oliari*, arguing that there is no *internal* consensus on same-sex unions in Russia (*Fedotova*, § 214).
- 20 It cannot be overlooked that the same reasoning can be applied, *mutatis mutandis*, to justify the right of same-sex couples to marry.

and *Przybyszewska and Others v. Poland* (2023). The Court has explicitly and rightly opted for a dynamic (evolutionary) interpretation of the Convention, which assumes that it is a 'living instrument' and dictates that it should be 'interpreted in the light of the currently shaped context and prevailing concepts in democratic states' (Garlicki, 2023, p. 31). In addition, it stated that the concept of family is also dynamic.

## 2. Case law of the Court of Justice of the European Union

In opposition to the ECtHR, the CJEU was, in its foundation, essentially economic in nature, as were the original treaties. As Rosas (2022, p. 205) explains, the Court gradually recognised fundamental rights as part of the general principles of EU law today. Although 30 or 40 years ago, it was still criticised for not being genuinely committed to protecting fundamental rights, it is impossible to say that the CJEU pays a mere 'lip service to such rights' (Rosas, 2022, p. 205). Regarding the differentiation between the two judicatures, Tryfonidou (2020, p. 104) notes that while the ECtHR gives effect to the human rights obligations that the ECHR aims to impose on its signatory states, the CJEU's role is to ensure 'that in the interpretation and application of the Treaties, the law is observed' (Article 19(1), Treaty on European Union, 2016) not only by Member States but also by the EU institutions.

The protection of same-sex couples in the European Community originated from freedom of movement for workers and the prohibition of discrimination on grounds of nationality or sex. At the outset, the message was not entirely clear, as evidenced by the *Grant* case (Judgment of the CJEU, 1998), which deals with travel concessions for unmarried persons granted only to partners of the opposite sex. The argument made that such a limitation constituted discrimination prohibited by Article 119 of the Treaty (on the principle that men and women should receive equal pay for equal work (Treaty on European Union, together with the complete text of the Treaty establishing the European Community (European Union, 1992) and Council Directive 75/117/EEC (European Parliament, 1975)) was rejected by the Court. The Court replied that the refusal was based on regulations that affected men and women equally, so there was no discrimination directly based on sex. It also stated that differences in treatment based on sexual orientation are not included in 'discrimination based on sex' (§ 44 and 45).<sup>21</sup>

The Treaty of Amsterdam (European Union, 1997) marked a significant change in the EU, paving the way for the current Article 19 of the Treaty on the Functioning of

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21 Facing the argument invoked in the Human Rights Committee's decision in *Toonen v. Australia* that declares that when Article 26 of the International Covenant on Civil and Political Rights mentions 'sex', it includes sexual orientation, the Court explained that even though Community acts had to respect fundamental rights which constitute an integral part of the general principles of law, those rights could not implicate an extension of the Community's competences.

the European Union (2016). On this basis, Council Directive 2000/78/EC (European Parliament, 2000), establishing a general framework for equal treatment in employment, was adopted. According to its first article, its purpose is combating discrimination on several grounds, including sexual orientation, in the field of employment. Despite its limited scope (which led to some work towards a more encompassing anti-discrimination directive; see European Commission, 2008), the Directive played a crucial role in addressing issues related to discrimination against sexual minorities, as it allowed such cases to be brought before the Court and decided accordingly. This Directive marked a milestone in the evolution of EU legislation concerning the fight against discrimination, precipitating a series of judgments in which the CJEU decided that couples of the same sex, when bonded by civil unions or marriages, were comparable to heterosexual couples and should be treated equally (Judgment of the CJEU, 2008; Judgment of the CJEU, 2011; Judgment of the CJEU, 2012).

This case law, and the protection it offers to same-sex couples, was limited not only because the scope of Directive 2000/78 is circumscribed but also because these judgments make comparability to marriage contingent upon the existence of a civil union, whose validity is up to Member States to determine. Without a state's legal recognition of unions between same-sex persons, the CJEU did not qualify the situations between same-sex and different-sex couples as comparable in the accession of Article 2(2a) of the Directive and hence concluded for the absence of direct discrimination. The Court censured the discrimination that resulted from comparison of the rights attached to civil unions between same-sex couples and those arising from marriages between different-sex couples. However, it did not censure discrimination stemming from the impossibility of same-sex couples being part of civil unions recognised by the Member States or marriages. Despite the lack of competence of the EU to interfere in the way Member States choose to regulate family matters, the CJEU could still analyse some cases, bearing in mind, as Tryfonidou states, that 'similar situations [should] be treated in the same way but, also, that different situations must be treated differently' (2020, p. 110).<sup>22</sup>

Directive 2000/78 is 'the only EU legal instrument that expressly imposes a positive obligation on Member States aiming to protect the rights of sexual minorities' (Tryfonidou, 2020, p. 105). However, the CJEU has also relied on case law concerning civil unions and marriage between couples of the same sex derived from the Directive 2004/38/EC (2004) on the Right of Citizens of the Union and Their Family Members to Move and Reside Freely Within the Territory of the Member States (European Parliament, 2004). Recital 31 of this Directive emphasises that 'Member States should implement this Directive without discrimination between the beneficiaries of this Directive on grounds such as [...] sexual orientation'. In the meantime, the Treaty of Lisbon (European Union, 2007) entered into force, placing the Charter of Funda-

22 As the Court seems to have done in the *Hay* case (Judgment of the CJEU (Fifth Chamber), 2013).

mental Rights as a binding primary source of EU law. The provisions of the Charter apply to the ‘institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law’. The Treaty on the Functioning of the European Union (2016) included in its general provisions, in Article 10, the broad objective of the Union when defining and implementing its policies and activities of combating discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

In this context, the *Coman* case (Judgment of the CJEU, 2018) put Directive 2004/38 to the test regarding same-sex couples’ rights. The CJEU reaffirmed that it is up to Member States to exclusively legislate on marriage and civil unions but in a way that complies with EU law. The refusal in this case to recognise the marriage of a third-country national to an EU citizen of the same sex for the mere purpose of granting a derived right of residence would interfere with Mr Coman’s right conferred by Article 21(1) of the Treaty on the Functioning of the European Union (2016) to move and reside freely in the territory of the Member States. The CJEU also stated that the restriction of this right cannot be justified on the grounds of public policy and national identity. As a result, the Court imposed a positive obligation on Member States, as explained by Tryfonidou, ‘to recognise the same-sex marriages of Union citizens for the grant of family reunification rights when they exercise their free movement rights under EU law’ (2020, p. 105). Even so, as he further explains, ‘the Court’s rationale for doing this is a purely functional one [...] rather than a genuine wish to protect the rights of sexual minorities’. Nevertheless, this anticipated judgment (Kochenov & Belavusau, 2020, p. 238; Mulder, 2018 p. 132) constitutes ‘an unquestionable achievement of the Court of Justice’ (Kochenov & Belavusau, 2020, p. 233), since it represents a breakthrough for the principle of equal treatment in the EU. It opens up ‘the third stage in the development of the equal marriage case law of the EU’ (Shahid, 2017, p. 407). The CJEU confined *Coman* to its facts, providing an interpretation with a narrow scope. It did not require an obligation from Member States to introduce same-sex marriage or partnership; this would be impossible due to the limits of EU competence, as family matters fall within the sphere of national law (Kochenov & Belavusau, 2020, p. 236). According to the Court, regardless of the marriage model adopted in their internal law, Member States are obliged to recognise a family relationship resulting from same-sex marriage; this recognition is to take place for the sole purpose of exercising freedom of movement and residence within the EU (Wojewoda, 2022, p. 261).

This line of case law is complemented by the 2021 judgment in Case C 490/20, *V.M.A. v Stolichna obshtina, rayon “Pancharevo”* (Judgment of the CJEU, 2021). The Court held that a minor whose status as a Union citizen is not established and whose birth certificate issued by the competent authorities of a Member State indicates as its parents two persons of the same sex, one of whom is a citizen of the Union, must be

recognised by all Member States as a direct descendant of that citizen of the Union within the meaning of Directive 2004/38 to exercise the rights conferred by Article 21(1) TFEU and by the secondary acts of secondary legislation concerning them.

### **3. Same-sex marriage in the jurisprudence of constitutional courts of selected states**

#### **3.1 Slovenia**

The Constitutional Court of the Republic of Slovenia has played an essential role in regulating the legal status of same-sex partners in the country. The Court has addressed the status of same-sex partners in procedures for reviewing the constitutionality of laws, when deciding constitutional appeals and when reviewing the admissibility of legislative referendums. The following is a chronology of the main decisions of the Constitutional Court on the legal regulation of same-sex partnerships.

In its decisions no. U-I-425/06 of 2 July 2009 and no. U-I-212/10 of 14 March 2013, the Constitutional Court evaluated the legal regime governing inheritance by same-sex partners. In the former, the Court ruled that Article 22 of the Same-Sex Civil Partnership Registration Act (Republic of Slovenia, 2005), which regulates the position of partners in registered same-sex partnerships, is incompatible with the Constitution of the Republic of Slovenia concerning the right to inherit from a deceased partner.<sup>23</sup> The Court ruled that, until the discrepancy is resolved, the same rules will apply to inheritance between partners in a registered same-sex partnership as inheritance between spouses under the Inheritance Act (1978). In the latter decision, the Constitutional Court ruled that the Inheritance Act is incompatible with the Constitution and that until the unconstitutionality is remedied, for inheritance between same-sex partners who have been living in a long-lasting partnership but have not entered into a civil partnership under the Same-Sex Civil Partnership Registration Act, and where there are no grounds which would invalidate such a partnership between them, the same rules apply as under the current statutory regime for inheritance between partners who are not married.

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23 The Constitutional Court found that, contrary to the prohibition of discrimination, the law regulates the inheritance of same-sex partners in a registered partnership differently from the inheritance of same-sex couples who have entered into a marriage or are in a civil partnership. It stated that the situation of same-sex and heterosexual couples is essentially the same, since in both cases there is a stable relationship between two persons who are close, mutually supportive and mutually helpful. The legislator did not base the distinction on a factual circumstance but on sexual orientation (Decision of the Constitutional Court, 2009, § 13–15).

The Family Code and the Act Amending the Marriage and Family Relations Act (ZZZDR-D) eliminated unconstitutionalities in individual acts established by the Constitutional Court and comprehensively regulated and equated same-sex and heterosexual couples in all rights and obligations at the general and system levels respectively (Žuber & Kaučič, 2019, p. 143). The primary issue of the legislative referendums on these two acts was whether the majority decided on the rights of a stigmatised and discriminated minority, namely same-sex couples, who are demanding recognition of their dignity and equality before the law. Such decision-making and the potential prejudicing of the constitutional rights of a minority could have been prevented solely by an advance prohibition of the referendum, which did not occur since the Constitutional Court had allowed both referendums (decisions of the Constitutional Court no. U-II-3/11 of 8 December 2011 and no. U-II-1/15 of 28 September 2015; see also Žuber & Kaučič, 2021, pp. 145–146) and thus left the final decision on the rights of a minority in voters' hands. Both referendums proved that legislative referendums are an inappropriate means for resolving controversial social issues in cases when such decision-making prejudices the rights of minorities and prevents the elimination of rights violations (Žuber & Kaučič, 2019; see also Žuber & Kaučič, 2021).

In a historic move, the Constitutional Court issued two landmark decisions in 2022 that granted same-sex couples the same legal status as heterosexual couples. In Decision no. U-I-486/20, Up-572/18 of 16 June 2022, the Court assessed the constitutionality of a legal regulation that reserves marriage only to persons of the opposite sex. It found that Article 53 of the Constitution does not explicitly state whether marriage can be entered into only by persons of the opposite sex but that this decision is left to the legislature, who, when regulating marriage, must also take into account the prohibition of discrimination under Article 14 of the Constitution and the argument of human dignity, which is the cornerstone of human rights. It reiterated the view, based on established constitutional jurisprudence, that same-sex couples, like opposite-sex partners, form durable partnerships. Thus the Constitutional Court held that legislation denying same-sex couples the right to marry is incompatible with the requirement of non-discriminatory treatment based on sexual orientation. It specifically stated that the argument of tradition, invoking the majority conception of marriage as the union of husband and wife, could not justify discrimination. Denying marriage to same-sex couples cannot contribute to the protection of the family, which is a constitutionally permissible goal. In Decision no. U-I-91/21, Up-675/19 of 16 June 2022, the Constitutional Court decided that a regulation under which same-sex partners cannot adopt a child together is also incompatible with the Constitution. Since the situations of different-sex partners living in a marriage and same-sex partners living in a formal partnership are essentially identical, the distinction in the regulation of joint adoption is based on the personal circumstance of sexual orientation.

Protecting the child is a constitutionally permissible aim which the legislator must pursue, but the government has failed to demonstrate that the exclusion of same-sex partners from joint adoption achieves this objective. Moreover, it stated that in some instances, such exclusion even prevents the protection of the child's best interests.

The legislature responded to the findings of these unconstitutional provisions by adopting the Act Amending the Family Code (DZ-B, 2023), which defines marriage as a living union of two persons (Article 3). The change in the definition of marriage in this context also affected the provisions on adoption, which had previously provided that a child could be adopted jointly only by spouses or cohabiting partners (Article 213 DZ-B). A legislative referendum was also announced on this law, but it did not occur; the Constitutional Court, during its review of the admissibility of this referendum, concluded that it was not admissible. It held that the content of the law was that of a law correcting established unconstitutional provisions and that such laws were excluded from the referendum procedure (Article 90(2), fourth indent of the Constitution; Decision of the Constitutional Court no. U-I-398/22 of 14 December 2022).

### 3.2 Spain

Same-sex marriage was legalised in Spain by Law no. 13/2005 of 1 July 2005, which modified the Spanish Civil Code (SCC; Republic of Spain, 1889) regarding the right to enter into matrimony. The most notable change brought about by this law is the amendment to Article 44 of the SCC, in which a second paragraph was added, stipulating that marriage between persons of the same sex is subject to the same requirements and has the same legal effects as marriage between persons of different sexes. The Partido Popular argued that the reform violated Article 32 of the Spanish Constitution (SC; Republic of Spain, 1978), specifically Article 32(1), which explicitly states that 'man and woman have the right to marry with full legal equality'.<sup>24</sup> An unconstitutionality appeal was therefore lodged against Law no. 13/2005. Seven years later, the Sentencia del Tribunal Constitucional (Judgment of the Spanish Constitutional Court, STC) 198/2012 of 6 November 2012 confirmed the constitutionality of the amendment to the SCC that was introduced by Law no. 13/2005.

Before 2005, the Spanish Constitutional Court had previously referred to same-sex marriage. It is worth noting the Auto del Tribunal Constitucional (Order of the Spanish Constitutional Court, ATC) 222/1994 of 11 July 1994, which recognises that, unlike 'marriage between a man and a woman' (Article 32(1)), 'a partnership between persons of the same biological sex is not a legally regulated institution, nor is its establishment embodied in a constitutional right' (ATC 222/1994, Fundamento Juríd-

<sup>24</sup> Article 32(2) of the SC allows the legislator to regulate 'the forms of marriage, the age at which it may be entered into and the required capacity therefore, the rights and duties of the spouses, the grounds for separation and dissolution, and the consequences thereof'.

ico (FJ) 2). Therefore, the Constitutional Court confirms ‘the full constitutionality of the heterosexual principle as a qualifier of the marriage bond’. However, it also acknowledges that the ‘legislator may enact a regime where homosexual partners may enjoy the same rights and legal advantages as marriage’ (ATC 222/1994, FJ 2).

In STC 198/2012, the Constitutional Court refers to ATC 222/1994 but provides a new interpretation of Article 32 of the SC in light of current circumstances (Portilla, 2013, p. 544). Concerning marriage as an institutional guarantee, the Court stated that the only difference introduced by the 2005 reform was that spouses may also belong to the same sex. Therefore, the Court understands that this reform develops the institution of marriage ‘without making it unrecognisable to the image held of this institution in modern Spanish society’ (Article 32 SC; STC 198/2012, FJ 9). Marriage is characterised by ‘equality between the spouses, the free will to enter into marriage with the person of one’s own choice and freedom to choose one’s partner and the expression of that choice and a manifestation of this wish’ (STC 198/2012, FJ 9; Expósito, 2013, p. 89; Presno, 2013). These essential marriage characteristics remain in the SCC even after the 2005 reform. Consequently, from this perspective, the option chosen by the legislator in 2005 cannot be considered unconstitutional (STC 198/2012, FJ 9).

Finally, the Constitutional Court, focusing on the analysis of the essential content of marriage as a fundamental right, concludes that from this perspective, Law no. 13/2005 is not unconstitutional either, because:

what the legislator is doing [...] is modifying how the constitutional right to marry is exercised, without affecting its content or harming the right of heterosexual persons to marry, since the contested law does not introduce any material amendment in the legal provisions governing the requirements and effects of civil marriage between persons of the opposite sex, and without the option chosen entailing the denial or restriction of the constitutional right of any person to marry or not to marry. (STC 198/2012, FJ 11)

In this context, the Court clarified that it could not be automatically concluded from ATC 222/1994 ‘that heterosexual marriage is the only constitutionally legitimate option’ (STC 198/2012, FJ 10). According to Enriqueta Expósito, ‘[t]he Constitutional Court Ruling 198/2012 constitutes the last link in the legal debate started with the enactment of the Law 13/2005’ (Expósito, 2013, p. 1) and expressly defines the Constitution as a ‘living tree’ (Martinico, 2015, p. 199). The Constitutional Court did not recognise the right to marry as a new right granted to same-sex couples but solely declared that same-sex marriage was not inconsistent with the Constitution (Roca Trias, 2017, p. 84). The decision of the Court relied on so-called ‘evolutionary interpretation’ of the Constitution (Martínez de Aguirre, 2016, p. 210).

### 3.3 Portugal

The Portuguese Constitutional Court ‘faced the constitutional question of same-sex marriages’ for the first time in its Ruling no. 359/2009.<sup>25</sup> The Court, in this appeal, was questioned as to ‘whether the Constitution *requires* [...] that marriage be *configured* in such a way as to encompass same-sex unions’ (§ 10).<sup>26</sup> The Court’s ruling was negative, which meant that it did not declare the applicable Article 1577 of the Portuguese Civil Code (PCC; Republic of Portugal, 1966), which until 2010 defined marriage as a contract necessarily ‘entered into by two persons of different sexes’, unconstitutional. The Court held that ‘the Constitution does not require the law to incorporate same-sex marriage, and [...] both prohibition of the latter and the provision for differentiated regimes are legitimate’ (Ruling no. 121/2010, § 6). It seems that the Court ‘at least implicitly accepted that the ordinary legislator’ could ‘extend the institution of marriage to homosexual unions’ (Miranda, 2010, p. 546).

Change came about when, at the beginning of 2010, Government Bill no. 7/XI (Republic of Portugal, 2009) was approved, which amended particular articles of the PCC to permit civil marriage between two persons of the same sex. The amendment included removing the requirement for the parties to be heterosexual from the definition of marriage in Article 1577 of the PCC. The president of the republic requested the Court to consider the constitutionality of these amendments with the constitutional concept of marriage established in Article 36(1) (Portuguese Constitution (PC); Republic of Portugal, 1976).

In its Ruling no. 121/2010 (Ruling of the Portuguese Constitutional Court, 2010), the Constitutional Court decided that the amendments to same-sex marriage in question were not unconstitutional. The Court concluded that the Constitution did not intend to prohibit the evolution of the institution of matrimony, even though the marriage described in the Constitution was between two persons of different sexes. Furthermore, focusing on Article 36(1) of the PC, the same Court stated that ‘the constitutional concept of marriage is an open one [...]. The ordinary legislator is charged with understanding what corresponds to the dominant conceptions in this matter at each moment in time and reflecting them in the legal order’ (§ 23). Thus, the Court clarified that the ‘key structural element of the concept of marriage, without which that concept is decharacterised, is not ‘the difference in sexes between the people who want to involve themselves in that shared life and to subject it to the rules of marriage’, but ‘the establishment of a shared life situation by two people’ (§ 23).

<sup>25</sup> Quote from Ruling of the Portuguese Constitution Court no. 121/2010, §7. The English translation is available at <https://www.tribunalconstitucional.pt/tc/en/acordaos/20100121.html>. Translations of this ruling are taken from this source.

<sup>26</sup> The English translation of Ruling no. 359/2009 is available at <https://www.tribunalconstitucional.pt/tc/en/acordaos/20090359.html>. Translations of this ruling are taken from this source.

For this reason, the marriage format is not deprived of its essential typical elements by allowing same-sex persons to marry, since

the state in which two people share their lives – which is characterised by sharing and mutual assistance, in a common life path that is governed by the law and possesses a nature that tends to perpetuity – also lies naturally within the reach of two people of the same sex who want to bind themselves in this way, one to the other and before the State (§ 23).

It follows from this configuration of the right to marriage as a fundamental right that the legislator cannot remove it from the legal order or alter its essential core (§ 23; Mariano, 2013, p. 36).

Finally, the same Ruling highlights that ‘extending marriage to spouses of the same sex’ does not conflict ‘with the recognition and protection of the family as a *fundamental element of society*’ (Article 67 of the PC). Indeed, ‘the Constitution untied the bond between the formation of a family and marriage’ (Ruling no. 121/2010, § 24). In summary, the Court concluded that the legislative initiative on which the request was based does not violate the institutional guarantee of marriage; it also considered that the initiative ‘does not have the effect of denying any person, or restricting, the fundamental right to (or not to) marry’ (§ 18). Following the Constitutional Court’s decision, same-sex civil marriage was permitted by the publication of Law no. 9/2010 on 31 May 2010.

### **3.4 Germany**

The regulations of German law stand out from others, as the legislature introduced the right of non-heteronormative persons to marry into the legal system by ordinary law. In the light of the amendment to the Civil Code dated 20 July 2017, ‘marriage is contracted [...] by two persons of different or the same sex’ (§ 1353(1)); this change is controversial and disputed in the doctrine of German law (Henninger, 2022; Łącki, 2018). Furthermore, it raises the question of whether the distinction between the spouses’ sex, not explicitly expressed in a constitutional provision, is necessary to define the institution of marriage and the realisation of its functions. Indeed, as the content of Article 6(1) of the Basic Law contains a conjunction of the concepts of marriage and family, it seems that these are separate institutions. This is important insofar as only the family is ascribed to the reproductive function; allowing in ordinary law the possibility for homosexual couples to marry would result in these unions being covered by the protection expressed in Article 6(1) of the German Constitution. It should also be recalled that in its judgment of 19 February 2013, the Federal Constitutional Court ruled that two persons of the same sex may have parental custody of a child. From the point of view of the addressees of the norms, it would be illogical to interpret them as prohibiting the possibility of homosexual marriage. In addition, in several judgments relating to the institution of same-sex partnership,

introduced firstly in 2002<sup>27</sup> and later extended in 2004 (Federal Republic of Germany, 2004) and subsequent years, the Court took the view that the different legal situation of spouses and homosexual partners in a life partnership violates the provisions of Article 3(1) of the Constitution. With this in mind, it seems a natural step to extend the institution of marriage to non-heteronormative persons. Giving priority to the principle of equality in Article 3(1) over the constitutional principle of marriage protection expressed in Article 6(1) of the German Constitution resulted in a change in the definition of marriage.

### **3.5 Austria**

A similar situation has arisen in Austria, with the proviso that the Austrian Basic Law does not contain provisions establishing special protection for marriage. The Austrian Constitutional Court has evolved in its exegesis of the principle of equality. In a judgment of 12 December 2003, it was argued that the principle of equality does not dictate the extension of marriage, as a union primarily aimed at having offspring, to other types of unions (Judgment of the Constitutional Court of Austria, 2003), while in a judgment of 4 December 2017, it was deduced that the legal regulation of marriage as a union based on the difference between the sexes not extending to same-sex unions is not acceptable in modern legal culture, in the light of the principle of equality. Furthermore, it was emphasised that partnerships between non-heteronormative persons and marriage as a union between heteronormative persons are based on the same values and are essentially equal (Judgment of the Constitutional Court of Austria, 2017). Thus the separation of the forms of institutionalisation of heterosexual and homosexual relationships violates the prohibition of discrimination resulting directly from the principle of equality expressed in Article 7(1) of the Austrian Constitution of 1920. The Austrian Court's ruling removed barriers to homosexual couples' access to the institution of marriage by pointing out the stigmatisation of relationships differentiated by the sex of the partners. Even the de facto equalisation of the rights and obligations of marriage and civil partnerships does not make the regulation constitutional. The only way to remove the violation of the norms of the Basic Law is to allow marriage to be entered into by non-heteronormative persons.

## **Conclusion**

The criterion for the selection of the five countries discussed above was aimed at justifying the thesis that the adoption by constitutional courts of a dynamic interpretation of the regulations of fundamental laws is a contribution to the institution-

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<sup>27</sup> For example, the judgment of 17 July 2002, BVerfGE 105, 313(351); the judgment of 7 July 2009, BVerfGE 124, 199; the judgment of 21 July 2010, BVerfGE 126, 400; the judgment of 19 February 2013, BVerfGE 133, 59.

alisation of unions for non-heteronormative persons. The constitutional courts have recognised the definition of a family as dynamic, constantly growing and evolving. This recognition has resulted in changing the definition of a marriage previously reserved for a union between a man and a woman.

The consistency in case law of the ECtHR, CJEU and national courts can be observed: as a general rule, the ECtHR tends to recognise same-sex marriage, although at the same time it leaves the regulation of this legal issue to Member States in their legal order. It follows from the case law of the ECtHR that limiting the institution of marriage to a union between a man and a woman does not constitute an infringement of the human rights of same-sex couples and does not constitute discrimination based on their personal situation. Protecting the value of the traditional family is a legitimate reason for regulating the individual rights of spouses and same-sex partners. The question that has arisen as to whether same-sex partners should be granted the same rights with regard to the possibility of marrying is, after all, within the margin of assessment of the individual state. In this regard, the ECtHR held in *Schalk and Kopf* that both procedurally and substantively, this right is subject to the domestic legislation of states, and the competent authorities of the state concerned are in the best position to identify the needs of the society, bearing in mind that marriage has deep-rooted social and cultural connotations that may vary considerably from society to society. This is a pragmatic approach by the ECtHR; by placing an obligation upon national authorities to recognise and regulate same-sex partnerships, the Court ensures a solution to several practical problems. Nevertheless, in the realm of matrimonial rights, the ECtHR concedes to the sentiments of certain segments of society regarding the union of two individuals in matrimony, asserting that national authorities are compelled to acknowledge same-sex partnerships and to delineate the rights and responsibilities of the partners involved. However, these authorities are not mandated to extend access to the specific institution known as marriage. In this manner, numerous practical challenges encountered by same-sex couples are addressed, while concurrently accommodating the sensibilities of conservative factions within society concerning the sanctity of marriage. This intricate balancing act reflects the Court's attempt to navigate the complexities of societal values while promoting legal recognition for same-sex partnerships.

Secondly, the ECtHR has consistently held that national laws governing the exercise of the right to marry (as allowed by Article 12) should not 'restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired'. In this context it has been observed that the Court has limited considerably the 'discretion of states and their margin of appreciation under Article 12. At the same time, the Court did not share the argument that negative public attitudes towards same-sex couples create a public interest allowing the state to refrain from legal institutionalisation. This means that no Member State of the Convention is still able to invoke its

cultural context as an argument justifying the denial of legal recognition and care to same-sex couples. The ECtHR's position is framed in a way that goes beyond the context of a single state. Moreover, it seems that in *Fedotova*, the ECtHR did not accidentally use the plural number in the term 'Member States', which indicates that it intended to create a jurisprudential precedent relating this Convention obligation not only to the respondent state but also to all other state parties to the Convention.

The CJEU, in its judgments, makes the recognition of marriage and civil partnership relationships conditional on the institution being legally recognised in a Member State. The CJEU confirmed that it is exclusively up to Member States to legislate on marriage and civil partnerships, but in a way that is compatible with EU law. Refusing to recognise a third-country national's marriage to a same-sex EU citizen for the sole purpose of granting a derived right of residence would interfere with the right to move and reside freely within the territory of a Member State. The CJEU also stated that a restriction of this right could not be justified on grounds of public policy and national identity. As a result, it imposed a positive obligation on Member States to recognise same-sex marriages of Union citizens to grant the right to family reunification when they exercise their right to free movement under EU law. Thus the Court's rationale is purely functional and not part of a genuine desire to protect the rights. Both the ECtHR and the CJEU have experienced a notably parallel evolution in their jurisprudence regarding equal marriage rights. Initially providing no protection, they have gradually progressed towards a reinterpretation of family and marriage concepts, embracing innovative interpretations and even acknowledging legally established marriages from other jurisdictions. The ECtHR has unequivocally asserted its vigilant observation of how EU law influences the status of individuals with same-sex orientations, frequently referencing the EU context in the rationales of its notable judgments, such as *Schalk and Kopf*. Similarly, the CJEU remains attuned to the doctrinal developments shaped by the ECtHR. Their reciprocal relationship and mutual influence have recently been underscored through landmark decisions, including the CJEU's ruling in *Coman* and the ECtHR's judgments in the Italian cases of *Oliari* and *Orlandi*.

Nonetheless, the disparities between the legal orders of Convention law and EU law carry significant implications. In its most recent landmark rulings, the ECtHR has unanimously reinforced the obligation of Council of Europe (CoE) Member States to extend legal recognition to same-sex couples, asserting that failure to do so infringes upon their right to family life. Any potential recognition of same-sex marriage for a full spectrum of legal contexts outside the ambit of EU law can only materialise through voluntary harmonisation by CoE Member States. The Convention does not mandate equality between these partnerships and marriage; similarly, the ECtHR does not obligate Member States to recognise such equality. Consequently, ECtHR judgments are binding solely on the signatories of the Convention to which

they pertain, with their actual implementation and the status of the Convention within national law contingent upon each state's constitution and will.

In stark contrast, the CJEU enjoys a unique advantage: while the ECtHR cannot dictate that the legal acknowledgment of same-sex relationships is an obligation applicable to all, the CJEU operates under the supremacy of EU law over the national laws of Member States, including their constitutions. Therefore, CJEU decisions wield direct binding force across all EU Member States. Though the CJEU is not beholden to ECtHR rulings, these decisions undeniably impact the CJEU, and vice versa, as evidenced by their respective case law. The robust interplay of rulings from both the CJEU and the ECtHR illustrates not only their substantial influence on national legal frameworks but also their profound mutual impact on each other's judicial reasoning. In any case, the jurisprudence of both European courts and national constitutional courts is evolving in terms of extending legal protection against discrimination towards forms of homosexual cohabitation, and permanent same-sex adult relationships are treated as a form of family life. Furthermore, a consensus has developed on the existence of a positive obligation for national legislatures to adopt legal regulations institutionalising same-sex unions. Nevertheless, the selection of the legal form of the union remains with the parliaments of individual states.

Selected states where the regularisation of same-sex unions has taken place due to the interpretation of existing norms have been also described. It should be emphasised that the noticeable diversity in exegesis has always aimed at a general recognition of same-sex unions by legitimising the legal shape of the relationship and the mutual rights and obligations of the partners. In many states, a parallel recognition model has been adopted by introducing the institution of civil partnerships into the legal order, alongside the traditional form of marriage. Despite the ECtHR's unequivocal jurisprudence pointing out that the prohibition of same-sex marriage constitutes discrimination based on sexual orientation, many states still reject the idea of a gender-neutral definition of marriage. The interpretations of the European courts and the rulings of the constitutional courts do not undermine the traditional concept of marriage as a union between a husband and wife, nor do they alter the conditions or implications of marriage for heterosexual couples. Instead, they allow same-sex partners to marry alongside opposite-sex partners.

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## Information on Gender Identity as Personal Data under EU and US Data Protection Models

**Abstract:** One of the most important legal issues concerning gender identity is ensuring that no one is discriminated against in any type of environment and that individuals' needs are considered seriously during the legislation process. Even though this can be questioned, if one needs to process information on gender to achieve an inclusive and diverse society and law, it seems that at this point in the history of society, there are no better measures to ensure a non-discriminatory environment than processing information on gender identity. Under the current personal data protection landscape, both in the European Union and the United States, it is not clear what the conditions are for processing information on the gender of individuals. Therefore, the authors of this article analyse legal requirements from both jurisdictions, also in the light of the question of the adequacy of personal data protection in the US under article 45 of the General Data Protection Regulation.

**Keywords:** adequacy, gender identity, personal data protection, privacy protection, sensitive data

### Introduction

The processing of personal data on gender identity is an issue that affects many data controllers. This applies to both the public sector (data processing to provide appropriate medical care, keeping civil status records, and taking actions to counteract discrimination in the public space (Agius et al., 2011, p. 59)) and the private (diversity and inclusion programmes run by employers, research on target groups and

brand perception, adapting work regulations and working conditions to the needs of non-binary or transgender people, maintaining employee documentation, and fighting discrimination). At the same time, although public and private authorities should be presumed to have good intentions when processing gender identity data, they may discriminate, unintentionally or intentionally (United Nations, 2020). Nevertheless, the question of whether processing information on gender identity helps prevent discrimination or has contradictory effects is not the subject of this article.

Performance theory explains gender as the expression of a set of assigned characteristics, designated feminine or masculine, which define ‘female’ or ‘male’ performance (Faithful, 2010, p. 456). The unity of a person’s performative experience constructs our ‘male’ or ‘female’ identities (Butler, 1990, p. 22). Some individuals, however, refuse their assigned roles or go off-script, choosing instead to express themselves outside of their ‘intelligible’ performance (Butler, 1990, p. 23). A person’s gender identity consists of both how they view themselves in terms of expression and behaviour, but also how those expressions relate to what is historically considered masculine and feminine, and ultimately male and female (Herpolsheimer, 2017, p. 47). Undoubtedly, it can also be said that gender identity is an element that can significantly affect the perception of an individual by society, and can lead to discrimination or alienation. Gender identity and its perception police interactions with gendered accommodations, such as public bathrooms, homeless shelters, medical treatment programmes, and system of confinement (D’Angelo, 2023, p. 559). By using characteristics of genders, individuals are inadvertently but inherently persecuted and stereotyped (Herpolsheimer, 2017, p. 46). There is no escape from a social perception of gender at this moment; certain characteristics which have been traditionally assigned to gender classification are active in societies, and there is a long way ahead before this perception changes.

The situation is even more complicated if one tries to rethink the concept of the necessity of including gender or sex indicators in national documents and registers (D’Angelo, 2023). If this is not the case, then valid questions arise about whether states and private sectors really *need* to process information on gender identity and whether this affects the data minimization rule. Nevertheless, it does not seem that either EU or US lawmakers are ready to admit that information on gender identity may not always be needed (the Supreme Court in Alaska, referred to below, is different), especially due to security concerns (see the example of the United Kingdom in Maier, 2020, p. 216).

In the meantime, in this article we try to focus on whether and to what extent personal data protection law in the EU and US applies to processing information on gender identity. By using comparative legal methodologies, we analyse which model of protection provides greater guarantees for individuals and how these models should be considered in light of the discussion around the adequacy of the personal data protection model in the United States. Bearing in mind the scope of this spe-

cial issue, we focus on a very specific sector of personal data protection law, while remembering that this contributes only partially to the discussion of a comparative perspective of EU and US laws. The hypothesis proven in this paper is that even though the guarantees offered in the EU and US models differ, at the end they provide a similar level of protection. Unfortunately, none of them leads to fully efficient solutions to overprocessing and discrimination based on gender identity. Considering the strong business connections between the EU and the US, and the amount of data transferred between both territories, this is crucial to understand what requirements are imposed on controllers when the laws of both jurisdictions are applied to them, and whether regulations in these jurisdictions are complementary in the light of adequacy standards (Kuźnicka-Błaszkowska, 2024, submitted).

## **1. Protecting information on gender identity under the EU data protection model**

A data controller considering processing information on the gender identity of data subjects should first reflect whether this information constitutes personal data within the meaning of the General Data Protection Regulation (GDPR). Omitting this stage may result in serious consequences, not only by violating the transparency obligations, but also by not recording the fact of processing information on gender identity in the data processing inventory or, potentially, in the data protection impact assessment. The controller's lack of awareness of what data they process may lead to a violation of the principle of minimization and proportionality or prevent proper risk analysis. But first and foremost, lack of understanding of what categories of data are being processed certainly leads to serious threats to the safety of processed personal data, and as a consequence may lead to the disclosure of information on gender identity to unknown individuals and, further, to discrimination.

According to the definition included in Art. 4 of the GDPR, any information about an identified or identifiable natural person should be considered as personal data. Factors enabling the identification of a natural person include their physical, physiological, genetic, mental, economic, cultural, or social identity. The threshold according to which the identification of an individual is determined remains low: the individual does not need to be identified, but only made identifiable (Jasserand, 2016, p. 302). Although gender identity has not been explicitly mentioned among the factors enabling the identification of a natural person, according to psychological science, it should be recognized that gender identity is part of social identities (Gulczyńska & Jankowiak, 2009, p. 30). Moreover, information about sex and gender is used to confirm the identity of an individual and, ironically, the world does not accept one's identity until that proof is presented (Herpolsheimer, 2017, p. 58). Therefore, assuming that the overriding purpose of the GDPR is to protect the rights

and freedoms of the individual, including, above all, their privacy and personal data, it seems that Art. 4 sec. 1 should be interpreted broadly, especially in the case of information in relation to which there is a high probability that its unauthorized disclosure would lead to a violation of the rights and freedoms of the individual. This is particularly important in the case of individuals who identify themselves as transgender or non-binary, who suffer from discrimination and exclusion not only in the EU or US, but around the world (Gates, 2011; Kuźnicka, 2018; Śledzińska-Simon, 2020).

It should therefore be considered that where information on gender identity is related to a specific person, it should be measured as personal data relating to that individual. Such a situation will not take place in the opposite case, i.e. when the information on gender identity does not concern a specific, already identified person or additional factors. In the vast majority of cases, information about gender identity alone will not allow the identification of the person to whom it relates. However, it may happen that information about gender identity, together with other information that is not personal data on its own, when combined can lead to the identification of an individual. Such a scenario, assuming correct identification, presupposes that information on gender identity will also be included in the catalogue of personal data.

## **2. Information on gender identity as sensitive data under the GDPR**

Against this background, however, the question arises of whether, due to the importance of information on gender identity for an individual, it should be treated as a special category of personal data (sensitive data). However, it seems that proposal that the recognition that information on gender identity is protected under Art. 9 of the GDPR is a proposal that goes too far. Pursuant to the aforementioned provision regarding special categories of personal data subject to protection under Art. 9 of the GDPR, information about sexual orientation and sexuality is recognized, among other things. The catalogue specified in Art. 9 of the GDPR is a closed one; it should not be treated as extensive. The doctrine indicates that sensitive data should include information unequivocally stating certain properties of a natural person, as well as information from which such knowledge can be derived with a high degree of probability by an average recipient (Sakowska-Baryła, 2018). Such a situation does not occur in the case of information about gender identity – its disclosure does not lead to an unequivocal determination of an individual's sexual orientation or sexuality, or other data indicated in the provision in question.

Taking into account the existing legal status in most EU countries, in which information about whether someone is a woman or a man is not a special category of personal data, it should consequently be considered that information about someone's transgender or non-binary status will not be sensitive data either. Additionally,

gender identity does not determine a person's sexual orientation. Both women and men, as well as transgender and non-binary people, can be heterosexual, homosexual, pansexual, or asexual (taking into account only the simplest and most popular division of sexual orientations). The disclosure and processing of information on gender identity will therefore not involve the processing of data on an individual's sexual orientation.

The relationship between information on gender identity and information on an individual's sexuality, which is also subject to special protection under Art. 9 of the GDPR, seems to be a little more complicated. Sexual identity is defined by psychologists as a construct of many aspects of human sexuality and the result of both biological and social factors (Bancrofsekt, 2011). At the same time, gender identity does not lead to the disclosure of information about sexuality per se. The latter, on the basis of the GDPR, is understood broadly; it may include information about sex life or sexual abstinence (Sakowska-Baryła, 2018). Sexuality data may include information such as frequency of sexual contact or preferences for sexual behaviour, but also sexual disorders. None of these are directly and inextricably linked to gender identity; it is impossible to assign specific sexual behaviours as a characteristic of one, given sex.

Important measures regarding the recognition of information on gender identity have been taken by the UK supervisory authority. Even though these considerations have been made after Brexit, to the best of our knowledge this is the only existing interpretation of processing information on gender identity under law which substantially incorporates the EU GDPR. Although, as a rule, the British Information Commissioner's Office (ICO) does not consider information on gender identity as sensitive data, it points out that due to the fact that it concerns people who are particularly vulnerable to exclusion and discrimination, it should be subject to increased protection. As mentioned in the explanatory memorandum to the decision about the Mermaids organization (ICO, 2021), regardless of whether information on gender identity should be classified as sensitive data or whether it may lead to the disclosure of other sensitive data, unauthorized access to and dissemination of this information entails significant damage to and suffering for data subjects.<sup>1</sup> Therefore, ensuring an adequate level of protection of this data is necessary, also taking into account the consequences of its disclosure for the data subject. However, one should agree with the ICO, which indicates that in some cases, information about gender reclassification may lead to the disclosure of data on the health of a given individual (ICO, 2021).<sup>2</sup> At the same time, information on gender identity will not always lead to the disclosure

1 Mermaids is an association of parents of transgender people actively counteracting discrimination against their children in the public space.

2 This may also happen in legal documents when an individual is in the process of gender reclassification, as various states require confirmation of the medical treatment and its type before reclassification of gender, e.g. in a birth certificate.

of information on gender reclassification. In cases where the sex recorded in the birth certificate corresponds to the actual gender identity of the individual, disclosure of information about gender identity will in no way lead to the disclosure of information about gender reclassification (because such a reclassification probably did not take place). This is similar in the case of people whose recorded sex does not agree with their sense of identity, but who have not started the reclassification process. One of the situations in which information about gender identity may lead to disclosure of information about reclassification, and thus health status, is when an individual has already made a full gender reclassification and at the same time still uses documents specifying their sex in the way it was recorded at birth.

In its decision, the ICO suggests that a risk-based approach should be followed if information on gender identity is processed by the controller. Even though this approach is strongly present in the GDPR, this leaves a lot of responsibility in the hands of the controller; it is a direct obligation put on them through Arts. 24 and 25 GDPR. However, this approach may have important consequences for individuals if the controller fails to fully comply or makes incorrect assessments. A risk-based approach requires controllers to take the risks to the rights and freedoms of data subjects into account; it considers both the extensiveness of the measures that should be taken to ensure compliance and the outcomes that should be reachable through these measures (Quelle, 2018, p. 506). The risk-based approach asks controllers to build a form of compliance that does not merely ‘tick boxes’, but is tailored to respect the rights and freedoms of data subjects (Quelle, 2018, p. 506). In fact, a risk-based approach requires controllers to assess whether existing norms are sufficient to ensure the protection of individuals’ rights and freedoms, and if not, to implement additional measures. This surely puts more obligations on the controllers and requires them to have knowledge and experience not only in the field of processing personal data, but also to become experts on human rights (or at least be close to it). This requirement may be overkill to many businesses, and in fact seems to shift responsibility for protecting fundamental rights from the state to business.

Nevertheless, even though the existing data protection regulation in the European Union does not provide strengthened protection for processing information about gender identity, the current wording of the GDPR, especially a narrow interpretation of Art. 9, does not allow for providing sufficient guarantees for processing personal data disclosing gender status. Enhanced protection should surely be given to those who identify as transgender or non-binary (considering their vulnerable status (Malgieri & Fuster, 2020)), but such protection may also become a tool for counteracting discrimination against women and men in specific areas of their lives. To achieve this goal, there is a need to change the current interpretation of Art. 9 GDPR in a way which will allow the expansion of protection to different personal data (which may bring further uncertainties and difficulties and is not the preferred solution), will change the literal meaning of Art. 9 to include information on gender iden-

tity in the catalogue of sensitive data, or will shift the protection towards focusing on use, harm, and risk rather than on the nature of the personal data (Solove, 2024), which is clearly visible in the data protection model in the United States.

### **3. Protecting information on gender identity under US federal law**

The entire system of protecting privacy and personal data in the United States is very different from the European. Law is fragmented, even though certain states have made the effort to introduce some general legislation. Mainly recognized as providing privacy standards in the country, the Fourth Amendment of the US Constitution does not apply to relations between private entities, and when it comes to relations between individuals and the state, it only applies in very limited circumstances (Judgment of the US Supreme Court, 1960; Kuźnicka-Błaszkowska, 2024 in press). Therefore, one should not look for guarantees for the safe and lawful processing of information on gender identity in the US Constitution.

Whereas the EU has acquired one definition of personal data under the GDPR, which refers to any information that identifies or allow the identification of an individual, the United States has taken a slightly different approach. Personally Identifiable Information (PII), as personal data is called under the US data protection model, does not have a single broad definition. Each state and each sector is regulated differently, which is one of the first reasons why the discussion about the adequacy of the US data protection model is so difficult (Schwartz & Solove, 2014, p. 879). Nevertheless, under state laws, the term ‘personal data’ as well as ‘sensitive data’ is used in certain legislation, and the meaning is close to EU standards.

On the federal level, the US still lacks comprehensive legislation in this field. There are a couple of examples of legal acts which aim to protect certain information on the individual. The Health Insurance Portability and Accountability Act (HIPAA) provides a broad definition of health-related information that is subject to strict standards regarding safety and disclosure. Processing of PII under HIPAA is regulated in a manner that is more closely analogous to the European model: HIPAA features enhanced notice requirements, as well as the requirement that ‘Covered Entities’ (generally, health care providers and insurers) obtain consent before using or disclosing protected health information for any purpose other than treatment, payment, or other health care operations. In either case, a fundamental part of the rationale for these controls is that sensitive personal information is easily subject to abuse or misuse, both by governments and by private employers, neighbours, or others. Information on gender and sex (as discussed above) will not always be related to information concerning health. Nevertheless, medical providers do collect and process information on gender identity, regardless of whether this is absolutely necessary considering the procedure a patient is subject to or whether it is justified by the fact

that 1) the medical provider is keen to use the right pronouns or 2) this information is required to ensure that the treatment provided is tailored to the patient (Ogden et al., 2020, p. 619). Considering that both purposes for processing information on gender identity may be justified under HIPAA, any wrongs shall be addressed by this Act. At the same time, the US model of personal data protection focuses rather on misuses of personal data which may lead to harm, discrimination, or exclusion. If none of this happens, an individual will not be able to build a case and therefore assert their rights in court.

Another legal instrument which aims at protecting the personal data of individuals on the federal level is the Children's Online Privacy Protection Act (COPPA). Unfortunately, COPPA mainly applies to commercial websites and online services targeting children under 13. Websites that do not target children – so-called general audience websites – that have 'actual knowledge' that they collect personal data from children also fall within the scope of COPPA. Under COPPA, personal data is defined as individually identifiable information about an individual, collected online. The definition contained in the Act is interpreted as providing guarantees for the processing of certain categories of personal data, such as age, gender, height, weight, school grade, interests, habits, hobbies, pets, friends, zip code, even first name (only), and the recording of preferences and movements online, as long as first and last names, address, phone number, or other contact information is solicited (Bartow, 2000, p. 661). COPPA does not distinguish sensitive data from 'ordinary' personal data, and therefore does not require different measures when personal data is processed. Similarly, to the GDPR, COPPA requires parental consent for processing children's data and an appropriate notification (Kuźnicka-Błaszkowska, 2022, pp. 495–497). Under COPPA, there is no enhanced protection for processing information about gender identity.

It has to be mentioned that despite the lack of comprehensive privacy laws, certain initiatives ensure that processing information on gender status does not lead to discrimination against individuals. Most of these relate to including information on gender identity in official documents such as passports and driving licences, but also birth certificates, medical files, and prison certifications. Considering the dual lawmaking system in the US, this is not only a question of having gender information included in the above-mentioned documents, but is also about introducing general, comprehensive, and unilateral classifications on requirements regarding gender identification (Spade, 2007–2008).

Several states in the US have made an effort to try to fill a gap in the model of personal data protection in their territory by passing their own rules and regulations in this area. The majority of them are modelled on the GDPR; however, certain differences have been introduced. Considering their powers, no states have been able to implement comprehensive, pan-sectoral regulation, but they have surely made important steps in ensuring the highest possible level of personal data protection there.

#### **4. Protecting information on gender identity under US state law: The examples of Delaware, Oregon, and Alaska**

Law implemented on the state level is applicable only to processing and controllers connected with the territory of the given state. One must be very careful when analysing the rules about the processing of personal information in specific states and when considering the changing landscape of privacy protection there. Among multiple states which have introduced several pieces of data protection legislation in recent years, only a couple distinguish between ‘usual’ and special categories of personal data (sensitive data). The scope of this article does not allow us to describe and explain each and every one of the state laws, but considering the theme of this analysis, it is crucial to explain how Oregon and Delaware protect information on gender identity, as these are the only states which directly refer to gender identity in their data protection laws.

Under the Delaware Personal Data Privacy Act (DPDPA), ‘personal data’ means any information that is linked or reasonably linkable to an identified or identifiable individual, and does not include de-identified data or publicly available information.<sup>3</sup> The DPDPA also defines the term sensitive data as ‘personal data that includes any of the following: a. Data revealing racial or ethnic origin, religious beliefs, mental or physical health condition or diagnosis (including pregnancy), sex life, sexual orientation, *status as transgender or nonbinary*, national origin, citizenship status, or immigration status; b. Genetic or biometric data; c. Personal data of a known child; d. Precise geolocation data’ (emphasis added). It is important to mention that ‘sensitive data’ under the DPDPA protects only information on whether the individual is transgender or non-binary, but not information if someone is man or woman. This seems to be reasonable, up to a point. Indeed, over the last few years, it has been transgender and non-binary individuals suffering the most from discrimination and exclusion.

The DPDPA requires the controller who processes sensitive data (including information on transgender or non-binary status) to obtain prior consent from the individual (the consumer) or, if this consumer is known to be a child, from its parent or lawful guardian. Additionally, processing of sensitive data should also be included in the data processing assessment. However, this requirement applies only to controllers who process personal data of more than 100,000 consumers. Data processing

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3 ‘De-identified data’ means data that cannot reasonably be used to infer information about, or otherwise be linked to, an identified or identifiable individual, or a device linked to such an individual, if the controller that possesses such data does all of the following: a) takes reasonable measures to ensure that such data cannot be associated with an individual; b) publicly commits to processing such data only in a de-identified fashion and does not attempt to re-identify such data; c) contractually obligates any recipients of such data to comply with all of the provisions of the law applicable to the controller with respect to such data.

assessment in Delaware (similar to the EU) must be conducted in the case of processing activities that present a heightened risk of harm to a consumer. This surely enhances the need for stronger protection of information on transgender or non-binary status. Another measure which should ensure the safety of the processing of sensitive data, including information on transgender or non-binary status, is the necessity for the controller to conduct enhanced control over recipients to whom de-identified or pseudonymous data is provided. In such a scenario, the controller must exercise reasonable oversight to monitor compliance with any contractual commitments to which the pseudonymous or de-identified data is subject, and must take appropriate steps to address any breaches of those commitments.

Even though the DPDPA provides reasonable guarantees for processing information on transgender or non-binary status, one must keep in mind that protection under this Act does not ‘apply to individual(s) acting in a commercial or employment context or as an employee, owner, director, officer, or contractor of a company, partnership, sole proprietorship, non-profit organization, or government agency whose communications or transactions with the controller occur solely within the context of that individual’s role with the company, partnership, sole proprietorship, non-profit organization, or government agency’ (DPDPA). Moreover, the protection applies only to residents of Delaware. This means that any consumer who is not a resident of this state must rely in this regard on the protection provided by federal law (which, as has been already stated, does not provide comprehensive measures).

Another state which has introduced a law aiming to strengthen measures around the processing of information on gender is Oregon. Senate Bill 619 (Oregon Consumer Privacy Act, OCPA) defines personal data as data, derived data, or any unique identifier that is linked to or can be reasonably linkable to a consumer or to a device that identifies, is linked to, or is reasonably linkable to one or more consumers in a household. However, the term ‘personal data’ under OCPA does not include de-identified data or data that (a) is lawfully available through federal, state, or local government records or through widely distributed media, or (b) a controller has reasonably understood to have been lawfully made available to the public by a consumer. This means that if a consumer made certain information publicly available (i.e. on an Instagram account, Facebook, etc.), the protection under OCPA does not apply. It is also crucial to understand that if the interpretation of ‘publicly available’ is understood as broadly as under the Fourth Amendment, any attempt to protect this information will be extremely difficult. This is because, so far, the Supreme Court has recognized that an individual who discloses certain information to a third party (regardless of whether this is an individual or a company) or abandons it in a public space should not have a reasonable expectation of privacy (Solove, 2011, pp. 93–114, and the case law referred to therein).

Additionally, OCPA defines sensitive data in a way that also protects information on an individual’s status as transgender or non-binary. Unfortunately, the strength-

ened protection does not include the content of communications or any data generated by or connected to an advanced two way communication systems or equipment for use by a utility. What is also important, similar to the DPDPA, is that OCPA provides limited protection for individuals that does not include either employment relations or relations between the state and the individual.

As the US law system is broadly based on case law, to further understand the nuances of protecting information on gender identity by states, it is crucial to look into specific decisions of states' supreme courts. In *K.L. v. State Dept of Admin*, the Superior Court of Alaska found that the routine disclosure of an individual's state-issued driving licence would expose their transgender status, would at least implicate non-fundamental aspects of the right to privacy, and that any procedure for changing the gender-identity marker on an individual's licence 'indirectly threatens the disclosure of this sensitive personal information' (Judgement of the Superior Court of Alaska, 2012). The court sympathized with the plaintiff, stating that one's transgender status is 'private, sensitive personal information'.

## Summary

The above analysis shows that the overall goal of both the US and the EU is the protection of the individual against discrimination, harm, and misuse of personal data. However, the United States does not regulate this in either a comprehensive or a detailed way. Thus, the United States and the EU share a similar goal in regulating this type of information, but the means they employ to reach that end are quite different (Hemnes, 2012, p. 11). Additionally, the protection guaranteed to individuals either at state or at federal level does not apply to data subjects in all areas of their lives and does not oblige all controllers (in public or private entities) to ensure that personal data is protected during processing.

Current interpretation of the GDPR does not provide sufficient guarantees for processing information on gender identity. This type of personal data cannot be considered as sensitive data (a special category of personal data) under Art. 9 GDPR. Enhanced protection can be foreseen; however, it is not certain whether the risk-based approach required by the GDPR is sufficient, considering the greater threat, and the serious societal implications, if information on gender identity is disclosed to certain actors. The approach taken by Oregon and Delaware provides a higher level of protection of personal data in the form of information on gender identity. However, as mentioned above, it has limited applicability. In terms of the subject matter, protection is definitely more useful to individuals, but the narrow scope of regulation means that in most situations, this protection is illusory or even non-existent. The ideal solution should aim at combining broad subjective protection with broadening the scope of regulation towards entities obliged to protect personal data.

Even if one considers the risk-based approach which is strongly promoted in the US and under Art. 24 and 25 of the GDPR, it may be impossible to introduce a unified and comprehensive course in international companies based only on this factor. Neither the EU nor the US are monoliths – the level of discrimination and exclusion based on gender identity varies in each state of the US and in each Member State of the EU. This is not only the consequence of different levels of social openness and respect for fundamental human rights, but also a matter of legislation, which may or may not allow for gender affirmations and the procedures required to legally adjust gender in official documents. In such a scenario, it seems that controllers should take the most restrictive approach possible to processing information on gender identity, which may have enormous financial implications and create a poor user experience.

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## In Search of Women's Identity

**Abstract:** The aim of this article is an attempt to answer the question of women's identity. Authors search for answers for this question in history, gender stereotypes and feminism. It should be remembered that the process of socialization plays a significant role in the process of identity construction. It is associated with the specific social environments in which human socialization takes place. The concept of identity raises the issue of social position as well as past and present position in the social system. Both collective and individual identities are fluid, change over time and are created throughout life.

**Keywords:** feminism, identity, stereotypes, women

### Introduction

Is there a need for a new definition of femininity? How can we detach femininity from a reduction of it to only a reflection or shadow of masculinity? Who is a woman nowadays? Another question which can be asked is, what defines modern femininity to a great extent? The possibility of self-realization? Maybe the necessity of meeting requirements or external pressures? And finally, what is women's identity? And also, after de Beauvoir, is it possible to change roles in such a way that women will stop accepting what is imposed from the outside and start defining themselves? Identity is a concept that has received many definitions. We understand identity as changeability, flexibility and the freedom of the individual to construct themselves. Identity is in

constant change, characterized by coherence, continuity and independence from the environment.

The aim of this article is an attempt to respond to the above issues. We search for answers for this question in history, gender stereotypes and feminism. It should be remembered that the process of socialization plays a significant role in the process of identity construction. It is associated with the specific social environments in which human socialization takes place. The concept of identity raises the issue of social position as well as past and present position in the social system. Both collective and individual identities are fluid, change over time and are created throughout life (Szczygieł, 2019, pp. 65, 72). We pose questions concerning a new definition of femininity which will not only be a reflection of masculinity. Our hypothesis is that historically imposed roles, perpetuated in stereotypes, have an impact on women's identity, understood as the freedom of the individual to construct themselves. We use historical-legal and theoretical-legal methods; these were applied to analyse academic studies relating to women's identity.

## **1. The impact of women's social situation on their identity from a historical perspective**

Women's place in society and culture is one of the issues that has been studied through scholarship which was created on the basis of the second wave of feminism (Kamprowski, 2011, p. 33). Women in Europe have been treated as subordinate to men in physical, economic and cultural ways since ancient times. Legally, women were the property of their father or husband, and the fate of unmarried women depended on the decisions of their father or brother. Ancient times, especially Greek antiquity, which are idealized nowadays, were no idyll for women. Some philosophers spoke with contempt about women; Plato claimed that women are incapable of experiencing deeper ideas. Aristotle also did not contribute to improving the situation of women, although at one stage he spoke of their equality being necessary. In practice, a Greek woman was a slave of her father and then her husband. In ancient Rome, women's influence on home life increased, although it was still her father who decided about her marriage. The Judeo-Christian tradition treated women as men's property – first fathers, then husbands, were obliged to provide for the woman. The biblical view of women influenced the later perception of them, particularly in the early Middle Ages.

The image of a woman in the early Middle Ages was a bad one, in which the negative aspects of a woman's personality, morality or nature were emphasized. Women's situation through the next few centuries was similar. Even if they were no longer formally the property of their husbands, they still had to obey them unconditionally. On the other hand, women from those times were able to use their position very ef-

fectively (Sławiński, 2023). In the Renaissance, the ideal of the educated woman was created. However, among philosophers and theologians, there was a conviction that women are weaker vessels who do not have a moral backbone as strong as men's and who are not equal to men (Bogucka, 1998, p. 116).

In the Baroque and the Enlightenment, the aristocracy valued the image of a magnificent lady, while the bourgeoisie preferred the image of a magnificent hostess. In this period, the role of education increased, thanks to which women became more independent and sometimes took up employment. Romanticism, the period of national liberation struggles, brought a new type of woman, a companion, although it did not bring many changes in terms of the perception of women and their identity. The tendency to rebel and to resist the 'natural order of things' started to become noticeable among women. The 19th century was a time filled with a wide range of new concepts; however, this kind of cultural eclecticism was not fully applied in shaping the perception of women. Both Romantics and positivists believed that femininity was associated with holiness, devoid of any signs of individualism, which was considered a negative feature and a manifestation of egoism. The axiom of the positivist era was the conviction that women's fate is marriage, motherhood, the household and a mission in a particular community (Syguła, 2009, pp. 58–73). In the 19th century, the man was the head of the house, the person managing the property, the life of subordinate family members and the household as broadly understood. Although not required by law, a convent was an alternative for a woman who did not want to marry (Wójtewicz, 2017, p. 111).

The social situation of women in 19th-century Europe was similar. Polish women were no exception. In Victorian England, despite the fundaments of the law and social changes, women still thought of themselves as *femmes couvertes* and the completion of their husbands, staying under the influence of the idea of 'the angel in the house'. Hispanic women accepted the role of *ama de casa* (housewife). Despite the loaded language, the role and function of women stayed almost without any changes (Syguła, 2009, p. 74), no matter whether the language had a more sacred tone (England), emphasized family aspects (Spain) or, finally, drew on patriotic reasons (as in Poland). Introduced in 1804 and a model for civil codification in many European countries, the Napoleonic Code significantly limited women's rights. The document, which was perceived as a masterpiece of legislative art, stated the equality of citizens before the law, but contained numerous regulations limiting the freedom of women (Wójtewicz, 2017, p. 107).

In the 19th century we can find the beginning of the discussion about the archetype of modern women and the model of women in the future. In this period, in journalism, there was a figure of the 'new woman', which contained various gender-based characteristics. It held together the visions and imaginations of the participants in processes of the creative shaping of social reality. They were the reflection of the effects of progress in emancipation and changes to family, property and electoral

law. Media images of the new woman portrayed them as practical, necessary to make them real in the everyday world. The foundation of such view was the issue of equal rights for women in all spheres of social and political life, including gaining electoral experience (Maj, 2022, p. 83). Although the differentiation of women's and men's attitudes towards work turned out to be an exceptionally permanent phenomenon, lasting at least throughout the 20th century (Aleksandrowicz, 2017), at the same time, performing professional work invariably determines different levels in the social hierarchy of prestige, depending on sex. Even in the first years of the 20th century, the independent social advancement of daughters – their social position becoming higher than that of their father – was rarely taken into account in family strategies. Even in the interwar years, in working-class families, and in fact also in most families of white-collar workers, success was seen in entering into a proper marriage. Custom prevailed over economic reasons, because women quit their jobs after marriage (Żarnowska, 2014, pp. 280–287). In the first years of the 20th century, when women increasingly began to take up positions previously reserved for men, one columnist warned young girls that by 'pushing' men out of positions, they act to their own detriment, because an unemployed man would not be a good candidate for marriage, which will result in an increase in the number of old maids (Kalinowska-Witek, 2014, p. 182).

Over time, the professional activity of women and their level of education began to increase. The number of women in high positions has subsequently grown. The phenomenon of late motherhood has been visible, as young women pursue their careers. The second half of the 1970s brought reflection on the low participation of women in public life. The new women's movement of the 1980s and 1990s analysed sex equality legislation. At the turn of the 21st century, due to European integration, globalization, social changes and emancipation movements, the need for a 'new gender contract' arose (Fuszara, 2002, p. 8).

## **2. Gender-based stereotypes and the problem of female identity**

The word 'stereotype' derives from the Greek *stereos* (tightened, hard) and *typos* (print, pattern) (Jędrzejowska, 2021, p. 161). Stereotypes are of interest to representatives of many fields, e.g. sociology, linguistics and psychology. In social communication, stereotypes are an integral part of the natural language and code of culture. They can lead to discrimination, causing a lot of negative consequences for people who experience it, and when disseminated in society are a reflection of social norms about thinking, feeling and behaving as people deem right. On the one hand, personal beliefs in stereotypes are a manifestation of a search for social affiliation and, on the other, are the result of achieving it. Moreover, a belief in sharing a stereotype with other people can also activate or form social identity. One of the stereotypes appear-

ing in every culture is that about gender (Lewicka-Zelent et al., 2020, pp. 75–83). The term 'gender stereotype' is frequently used in literature on the subject interchangeably with or next to the following: understanding of gender, gender constancy, sense of gender identity, schema relating to gender, gender stability, the notion of gender roles, the process of gender typifying (Jędrzejowska, 2021, p. 161).

Stereotypes of masculinity and femininity are beliefs regarding the mental characteristics of men and women, and the actions and behaviours of one or the other sex. The concepts of gender roles and stereotypes are connected. When people recognize a behavioural pattern of women or men, they tend to skip particular exceptions and assume that a certain behaviour is inevitably associated with one or the other sex (Wołpiuk-Ochocińska, 2020, pp. 145–146).

Men's and women's gender identity is not only determined by biological characteristics of the sex (such as anatomy, physiological aspects, the endocrine system) but also by social and cultural formation through the patterns of behaviour imposed in a given culture, models of masculinity and femininity, social roles, social norms and expectations that function in a given culture as gender stereotypes. According to the stereotypes of gender roles, the roles of the person responsible for securing the material existence of the family are male, while the care and raising of children, as well as running the household, are roles assigned to women. The male stereotype is that the man is the head of the family, the leader, who is responsible for the financial support of the family and for repairs in the household. A woman, on the other hand, is a source of emotional support for family members and is the person managing the household, taking care of and bringing up children, and responsible for furnishing the home. There is a stereotypical belief that women work well in professions that will be an extension of their family roles, i.e. in professions related to subservience, caring, showing empathy and requiring communicativeness. It is stereotypically assumed that women are focused on others, on providing help, on care, and that they are characterized by interpersonal sensitivity, selflessness, a high level of empathy and emotions expressed through delicacy and kindness. In the stereotype of femininity, several subtypes are distinguished: the 'tomboy', wife, housewife, mother, businesswoman, feminist, lesbian, etc. (Królikowska, 2011, pp. 388–389).

Gender stereotypes perpetuate violence towards women (Helios & Jedlecka, 2016, pp. 62–101). Prejudices and practices concerning women, created through centuries, are often bound up with culture or tradition, for example female genital mutilation, forced marriage, domestic violence, dowry murders or attacks with acid. They can justify sex-based violence against women as a form of control over them. The goal of such violation of the physical and psychological integrity of women is to deprive them of equal enjoyment and knowledge of human rights and fundamental freedoms. The consequences of these forms of violence help to keep women subordinate and contribute to the low participation of women in political life and their lower education, skills and opportunities in the labour market. In traditional socie-

ties, there is much greater acceptance of violence by men against women in various situations. Violence legitimizes a man's sense of power and his privileged position in the social structure (Nowakowska, 2008, pp. 150–157). Not all stereotypes result in men's violence (Kędzierska, 2009, p. 223).

In society the 'prescription of motherhood' was created, which was conditioned not only biologically but also culturally. Hence, the role of a woman is largely defined by children (Przybył, 2006, p. 284). Women across the whole world carry a greater burden for infertility. There is a long history of treating an infertile woman as inferior and morally and socially corrupt. According to this social message, it is the woman who is responsible for the lack of children and blamed for infertility. Even if there is an awareness that the cause of infertility can equally be in the man's body, there may be a story behind it of the woman's ultimate guilt. In this case we seem to come back to well-known theories which show that woman is on the side of 'nature' and that it is nature which designates her place in society. Man creates 'culture' and thanks to this does not have to worry about his biological age. The stereotype of woman-as-mother is still doing well and is at the centre of women's identity. Being a mother, now or in the future, is a strong element of the identity narrative of a large number of women in our culture. This equation becomes clearest when it cannot come true; realizing the impossibility of getting pregnant makes the maternal element of one's biography come to the fore. Motherhood becomes the centre of identity and destabilizes it. When there are so few options for women in the market of possible roles, difficulties in becoming a mother force a woman to withdraw and doubt her femininity (Radkowska-Walkowicz, 2013, pp. 76–80). The problem with specifying identity also exists in the case of a woman who is childless by choice, whose decision not to have children destabilizes her identity and role in social perception, and is also associated with a lack of social acceptance. In a large part of society, especially among those with conservative views, marriage and motherhood (Rachwał, 2019, pp. 57–67; Szczepaniec, 2013) are still treated as the greatest achievement of a woman (Wieczorkiewicz, 2023).

Stereotypes which stigmatize women, especially ones based on gender, should be treated as violence towards women. It is worth emphasizing that in Art. 4 Sec. 2 of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (the so-called Istanbul Convention), a general obligation to counter all forms of discrimination against women was formulated, primarily by taking appropriate legislative action (Lewicka-Zelent et al., 2020, p. 84). In many countries, women do not yet have their fundamental rights, such as equal access to education and job opportunities, guaranteed. In wealthy countries, such as Japan, women still do four times more unpaid work, such as cleaning and childcare, than men. They are more likely to experience physical violence in all countries. The 'tragic consequence' for many is simply the awareness that the modern woman has a choice and can live as she wants (Kopińska, 2022, p. 214).

### 3. The influence of feminism on the evolution of women's identity

Are we currently facing a crisis of female identity (Sharma, 2022, p. 384)? And where might this crisis among contemporary women stem from? The position of women has always been related to the position of men. In France, a discussion that continues to this day addresses the issue of female identity; presently, the dominant trend in feminist thought is liberal feminism (Cabaj, 2010, p. 85; Fairfield, 2005, pp. 11–14; Michna, 2013, pp. 170–171). Its representative, philosopher Elisabeth Badinter, argues that women themselves have led to the current crisis. According to Badinter (2013), a particular focus in contemporary feminist discourse is the issue of motherhood and its influence on the identity quest of women, as discussed below.

As mentioned, in the early 20th century, women were considered beings created for life within marriage, finding joy in domestic tasks and their role as wives and mothers. The external world belonged to men. Girls were prepared for the role of a wife, to be obedient, submissive and to patiently endure the hardships of marriage. The situation of the 'old maid' worked against women, placing them in a disadvantaged position even within the family. The family model depended economically on women, and wives on their husbands, reducing them to the role of a homemaker and denying them the right to truly decide about themselves and their lives (Kwak, 2019, pp. 5–7).

Within feminist discourse, the issue of female identity has a long history. Initial philosophical reflections were linked to the critique of the worldview propagated by men in a patriarchal society. In order to dismantle the hegemony of the male perspective, feminists began with the deconstruction of entrenched dichotomous thinking within European culture. Beyond deconstruction, the discovery of and attempt to incorporate works by women into the philosophical canon, which had hitherto gone unnoticed in the public debate, was also significant. The goal of feminists, after all, was to integrate female thinking into mainstream reflection on the world and humanity. However, what feminists achieved in the second half of the 20th century was the inclusion of ethics into philosophical discourse, particularly the ethics of care, which is built around the concepts of relationality and custody, as opposed to the patriarchal ethics of justice or normativity (Michna, 2014, pp. 134–136).

Simone de Beauvoir's *The second sex*, published in 1949, analysed the essence of femininity, thus initiating a discussion of women's identity that continues to this day. De Beauvoir observed the problem faced by contemporary women, who were essentially deprived of the ability to define their own identity. According to the French philosopher, self-determination is a primary, fundamental and inherent need for every human being; it means the definition of oneself, one's own identity, and constitutes an inner necessity for every person. In de Beauvoir's opinion, no one is born a woman; rather, they become one in the process of seeking their own female identity. Therefore, the essence of being a woman, just as being a man, is the result of subjective

effort undertaken by each individual in the realm of their individual existence. Thus, a person makes themselves into what they ultimately are. Consequently, humans possess innate freedom, as derived from the doctrine of existentialism; freedom, in turn, shapes every individual as a self-realizing project. As a project, a woman seeks her identity because she has the right and obligation to do so, independent of the will of a man (Helios & Jedlecka, 2018, pp. 37–40; Michna, 2013, pp. 172–173). It is advocated that women should be viewed through the prism of their capabilities and, above all, their freedom – a fundamental aspect without which no person can truly self-realize or define themselves. Freedom is an essential reality for every human being (Ples, 2011, pp. 121–122).

Liberal feminism, where the issue of women's personal freedom is of paramount importance, plays a very significant role. It strives for the equal civil rights of women and men, equal access to education, and better healthcare, especially considering pro-choice policies. Gender roles should not negatively impact individual development and self-fulfilment. The essence of liberal feminism's concerns is often termed 'women's rights feminism', as it has undoubtedly contributed to educational and legal reforms that have improved the quality of life for women. It is worth acknowledging that achieving this kind of liberalism also involves recognizing that women's individual efforts, when coupled with the rejection of gender biases, are unfortunately not sufficient (Bratek, 2007). By allowing various forms of legitimization and the development of women's rights as citizens, political-liberal feminism promotes the countering of various forms of subjugation that women may face, depending on the context in which they operate (Lisowska, 2019, p. 133).

Seeking one's own identity is the essence of humanity. Self-realization, self-definition and self-formation are the core of humanity and, simultaneously, the greatest desire of every individual – as Ples (2011, p. 119) writes, and which is hard to argue with. Women will continue to search for their identity and opportunities for self-realization. An important role in this process will be played by debunking the myth of femininity. The myth of the ideal woman is constructed based on a set of traits, products of male consciousness, and permeates the entire culture. It can also be found in religion, tradition, art and language. Overthrowing this myth will be an additional victory for women.

The existentialist trend in feminist philosophy was strong, especially in the 1950s and 1960s. Its significance diminished somewhat with the emergence of new trends in feminist philosophy, such as the psychoanalytic and postmodernist movements. The former, drawing on Freud's methods of analysis, focused on exploring the depths of women's psyches. Postmodern feminism (also known as French or academic feminism), on the other hand, drew from the works of Lacan and Derrida. Its fundamental thesis is the belief that it is impossible to externally change the prevailing identity statuses of women and men. People are prisoners of a structure that does not allow for any changes, and this structure defines our identity as either male or female. Changes

are only possible within the structure itself but are hindered by women's traditional thinking about their own gender. Therefore, according to postmodern feminists, this structure is characterized by durability, and regardless of changes in discourse, it does not allow women to independently seek their own identity (Michna, 2014, pp. 137–139; Ples, 2011, p. 126). The postmodernist paradigm led to the questioning of the 'certainty' of feminism, referred to as women's discourse. Postmodernism and its associated intellectual movements revealed how problematic the term 'woman' is (Bratek, 2007).

It should be added that in the second half of the 20th century, a resurgence of what is known as 'reactionary naturalism' occurred, which did not remain without influence on women's exploration of identity. It encompasses three doctrines: ecology, ethology and essentialist feminism. According to this thinking, women should once again become devoted mothers and caretakers in the home. This approach is accompanied by a sense of guilt that deviating from the laws of nature can leave a mark on the psychological and physical development of the child. Regardless of one's views on reactionary naturalism, it undoubtedly has an impact on shaping female identity. The phenomenon of 'babycentrism' can be observed as a result of this naturalism. Women search for their identity, but lose it in the process of complete dedication to their child's needs. It could be said that women are returning to the quest for their own identity not through an individualistic approach but through an essentialist motherhood (Michna, 2013, pp. 173–176).

Contemporary women find themselves torn between three conflicting aspects of their identity: motherhood, being a conscious and liberated woman, and conscious childlessness. This leads to the need for a new definition of femininity. Michna argues that the identity crisis has led to profound changes in how modern women are perceived; simply resorting to outdated tools or definitions is insufficient today to determine the essence of femininity. The new definition should consider the perspectives of naturalists and maternalists but should not focus on the idea that having a child is a necessary factor for a woman to attain her identity. The 21st century has not yet provided a solution to the issue of women's identity. Women still struggle with self-definition, grappling with conflicting emotions and being torn between individualism and the ideologies presented by contemporary naturalists and maternalists. There is a call for a renewed reflection on the essence of femininity, one that allows for the resolution of the conflict between being a woman and being a mother. This definition of femininity should take into account the diversity of views on female nature and move away from defining women in relation to someone or something else – men, motherhood or the biological conditions of sex. It is certainly not an easy task, but perhaps it is inevitable that women take on this challenge with the belief that creating such a definition is possible and realistic.

Contemporary women are burdened in two ways: on the one hand, with their professional work and opportunities for self-development, and on the other, with

their work at home and the ideal of committed motherhood. This dual confinement of women's identities requires a new definition of femininity, one that is multidimensional, encompasses naturalism and avoids defining women 'in relation to'. It is essential to define the needs of each sex, which is why men are also invited to participate in the discussion about women's identity. Although, as previously mentioned, women are primarily held responsible for the ongoing identity crisis, there is still faith in the strength and determination of women to redefine their identity through dialogue, independent of external factors (Michna, 2014, pp. 146–154).

The issue of motherhood certainly stands at the centre of feminist reflection as a theory and as a social movement. Wodzik refers to feminist reflections on motherhood as the 'gradual denaturalization of the mother's role and motherhood itself'. In the first wave of feminism, motherhood was considered purely 'natural', where being a mother was seen as a complement to being a woman. However, the influence of culture and socialization on the perception of motherhood became evident. Motherhood is described by de Beauvoir as a kind of compromise between narcissism, altruism, dreams, sincerity, deceit, dedication and cynicism. According to her, there is no such thing as a maternal instinct. Badinter similarly asserts that the maternal instinct is merely a social construct, and motherhood is an ideology perpetuated in culture. She believes that the so-called maternal instinct is nothing more than a stereotype based on a woman's gender role. De Beauvoir depicts the situation of a woman tormented by biological processes, a woman who faces much more difficult conditions for creating her own identity. She also believes that biology is not a suitable criterion for determining the priority of one sex over the other in terms of the role of ensuring the continuity of the species. Thus she demonstrates that the discourse that treats motherhood as something natural has become outdated, because a woman's situation is not only about the possibility of giving birth but also about the process of girls' socialization, the presence of specific cultural stereotypes and the real choices made by women. In the first wave of feminism, it was assumed that motherhood was a constitutive condition of femininity, an essential element of being a woman. If a woman decided not to become a mother, it was believed that she was also renouncing her femininity. Challenging naturalism in the realm of motherhood allowed for the questioning of the identity of women at the beginning of the 20th century. It was not, of course, a complete rejection of motherhood, but rather an acknowledgement that the decision to become a mother should be one of many possible choices for women; it should be a conscious choice, not just conformity to widely accepted social conventions. The goal of demystifying motherhood, as undertaken by de Beauvoir, was to show that the ideal of a mother solely devoted to the family is incompatible with the requirement of women's independence, as advocated by the first wave of feminism (Wodzik, 2011, pp. 91–102).

Wodzik points out that three types of approaches to motherhood, reflecting its denaturalization process, can be identified. First, essentialism sees motherhood as

tightly linked to an unchanging and universal nature of women (Butler, 1990, pp. 14–16). Second, in the perspective of social structure, motherhood is analysed as an element of the social system. And third, social constructivism treats motherhood as a social construct upheld by members of a particular community (Wodzik, 2011, p. 103). Considering the multitude and diversity of views and theories regarding maternal instincts, it is challenging to unequivocally state whether motherhood is a woman's need or merely a response to societal pressures.

Currently, women's roles in the family have been transformed, compared to traditional roles. One could say that the dilemma of whether to work or have a family is a concern primarily for women; men, on the other hand, are not significantly affected in their professional careers by family responsibilities. Women address this issue by adopting various lifestyles in which they attempt to reconcile family duties with professional obligations. Nowadays, there is also talk of a kind of harmony between the roles of mother and woman, suggesting that these two truly complement each other. Most women do not limit the concept of femininity to motherhood and believe that one can be fully feminine without having children (Marszałek, 2008, pp. 273–275).

Regarding women's professional activity in the job market, there is still a tendency to focus on certain professions and lower levels in the professional hierarchy (i.e. a horizontal and a vertical segmentation). Most women still pursue education in fields such as the humanities, which have traditionally been feminized. This traditional sex segregation in the job market remains widespread. The majority of women work because they want to, not out of economic necessity. Work is a source of self-development, self-realization and something that boosts their self-worth and allows for personal growth (Marszałek, 2008, pp. 276–277).

## Conclusions

In general, women had and still have a lower social status than men, in all spheres of life, in fact: social, cultural and economic. Existing pressures of a biological, social and cultural nature have an impact on internal splits and conflicts within the value system. Women have to create their own model of identity, which also depends, after all, on the strength of the pressure and, as a result, on which values will be at the centre of the search for identity (Marszałek, 2008, p. 277).

Women's departure from the traditional role of mother and wife leads to the construction of a new identity based on choices regarding family, private and professional life. Of course, this is not a simple and easy path; it involves experiencing many limitations and falling into various traps regarding, among other things, overlapping roles and conflicts between these roles, changing the meaning of the institution of marriage, etc. Various processes are important in this matter: the individualization of women, new family or work models, but also the preferences of women themselves in

terms of attitudes, values, interests and expectations. Women still face the dilemma of creating their own new identity; their awareness is the basis for building it. Of course, not all women strive to make changes and create a new model. Tradition does not disappear, and for some it is very important, which should be respected. The most important thing, in our opinion, is choice. A woman can build a new role, but she does not have to. Her own preferences, life situation and reflections on building her own identity are significant. It is also necessary to be aware of the differences between women and men, while recognizing them as equals. And in our opinion, it is not hormones or instincts that define a woman: what defines a woman is the way she views her body and how she defines her own relationship to the world (Ples, 2011, p. 125).

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## The Nomos of the Water: Indigenous Narrative Identity Claims to Justify Granting Legal Personhood to a River

**Abstract:** This article, anchored in Indigenous narratives, identifies the core arguments for granting juridical personhood to rivers and appointing Indigenous citizens as their legal guardians. The core arguments are as follows: for Indigenous peoples, dwelling on riverbanks is a matter of identity. This identity manifests itself through various interpersonal practices, including language – thus, narratives – and caring. The analysis of sampled narratives has uncovered valid rationales for granting legal personhood to rivers due to identities common for rivers and their dwellers, rivers' specific capabilities, and their actantial features (rivers can act). Both legal personhood for rivers and Indigenous dwellers being in the role of their legal guardians are unique legal institutions to fulfil the critical interests and capabilities of rivers at a time when these fragile ecosystems are under threat. We illustrate this by using the Amazon and Oder rivers as examples and referring to the Yanomami's and Olga Tokarczuk's narrative accounts.

**Keywords:** Amazon and Oder rivers, dwelling, granting legal personhood to rivers, indigenous narrative identity, Yanomami and Tokarczuk narratives

## Introduction

*Celestial Law [Nomos] [...]  
the seal which stamps whatever the earth contains,  
and the liquid plains [...]  
for thy command and alone,  
of all that lives, order  
order and rule to every dwelling gives.  
(Orphic Hymn 63 to Law [Nomos])*

In this article, we argue in favour of giving legal personhood to rivers whose guardians would be the Indigenous inhabitants of the riverbanks. We want this idea to be accepted and no longer considered absurd (Jonas, 1984). *Ribeirinhos* are the native inhabitants of dwellings identical to riparian *oikoi*, i.e. dwellings at the interface between land and a river. In Indigenous contexts, belonging to these specific *oikoi* takes on a unique sense and stands for non-anthropocentric identities expressed in related narrative practices. In turn, the concept of *nomos* could be useful in addressing why a human's belonging to a specific habitat is rooted in natural law (Cajete, 2000; Saile, 2000), as is increasingly noticed by legal institutions. For Schmitt (2006), the concept of *nomos* is irreducible to law and norm; it encompasses the 'law of life', the 'soul of the whole', a 'circle of people', and a 'spatially concrete unity' (see also Ronda, 2013). Nonetheless, we do not wish to explore Schmitt more broadly, as he glorified the supremacy of 'the European spirit' in the context of colonial *occupatio*, thus outlawing and – in terms of spatiality – displacing Indigenous peoples from their primordial *nomoi*.

Indigenous identity is indissociable from the habitat or *oikos* as well as from the natural law governing individual and communal life forms in that habitat (rather than, for example, being displaced from and dispossessed of it). This inseparability finds articulation in Indigenous narratives. The life worlds and life forms cultivated in dwelling in such places include a variety of interhuman practices, including language – thus, narratives – and caring (Peters & Irwin, 2002), in terms of environmental stewardship and river management. Because the 'narrative identity mediates between "what is" and "what ought to be" [...] it occupies a middle ground between neutral description and ethical prescription' (Laitinen, 2002, p. 58).

In this respect, narratives are essential for justifying the rights of nature in the campaign for granting legal personhood to rivers and the appointment of their native dwellers as their legal guardians. At the same time, these narratives must not be decontextualized (and, respectively, appropriated) by universal narratives or theories of law (Herb, Falardeau & Talano, 2023; Ioris, 2019; Johnson & Larsen, 2013; Pearce & Pualani, 2008; Smith, 1999; Stedman, 2003). We will examine examples of Indigenous narratives in their original semantic horizons to identify valid arguments in

favour of granting legal personhood to rivers and making Indigenous citizens their legal guardians. Once granted legal personhood, the river is protected and humans cannot readily destroy its ecosystem, as the river is presumed to be a vital part of both cultural identity and the Earth's hydro – and biodiversity.

## 1. Why narratives?

Indigenous narratives contain unique imaginaries, values, and truths about an Indigenous community's belonging to its unique natural habitat. Narratives are not only integral to a community's identity and place in the world (Iseke, 2013; Norman, 2017); they also include original legal traditions (Goldtooth, 2017; Napoleon & Friedland, 2016) and offer normative arguments to challenge existing legislation when the latter fails to deal with serious environmental degradation (Fabio, 2023; Garnett, Burgess, Fa et al., 2018; Morris & Ruru, 2010; United Nations, 2009) or socio-economic and cultural devastation striking Indigenous communities (Lear, 2006).

Approximately 5,000 Indigenous people groups live worldwide (476 million people – around 6.2% of the global population). Indigenous narratives voice 'the quest for self-determination' (Kramm, 2020, p. 311). This occurred over centuries in colonial circumstances, whereas in postcolonial contexts, 'Indigenous legal traditions are fundamentally about Indigenous citizenry, self-determination, and governance. They contain the intellectual resources and tools for public reason and deliberation essential for addressing the internal and external challenges that Indigenous communities face today' (Napoleon & Friedland, 2016, p. 727). The campaign for reinvigorating Indigenous legal traditions is gaining momentum (Sujith, Jacobs, Waboose et al., 2021), which is meaningful because dominant or majority interests continue to violate bonds and belonging. These violations are both economic and ecological, such as establishing conservation areas at the cost of the displacement and dispossession of, and discrimination against, native inhabitants.

It is thus imperative that the validity of Indigenous narratives be recognized if legislation on Indigenous territories – including complex and fragile aquatic ecosystems – is to be more democratic. In this regard, 'nonrecognition or misrecognition [of Indigenous reasons] can inflict harm [and] can be a form of oppression, imprisoning one in a false, distorted, and reduced mode of being' (Taylor, 1992, p. 26). Understanding and recognizing the narratives in question (Akhtar, 2023) would be a preliminary step towards a more democratic and decolonized justice free from epistemic and hermeneutic injustice (Fricker, 2007; Helenius, 2016; Taylor, 2012). Addressing the recognition of rights, philosophy itself becomes a 'discourse of recognition' (Ricœur, 2005, p. xi). Besides identities and belonging, the narratives in question articulate responsible attitudes of native dwellers towards their *oikoi*. Self-governance and legal institutions founded on the recognition of such narratives include local,

regional, and global river or water parliaments and aquatic embassies that involve native citizens (Berros & Brara, 2022; Liedloff, Woodward, Harrington et al., 2013; Whiteside, 2013).

## 2. Why rivers?

Many rivers still bear colonial names. This hydronymy (a branch of toponymy, the naming of geographical features, dealing with the study of the proper names of water) has become the subject of hydrocritical studies (Baumgartner, 2022; Hofmeyr, 2019; Hofmeyr, Nutall, & Lavery, 2022; Moraña, 2022; Winkiel, 2019; Biolik, 2018). But, in addition, rivers are at risk of destruction by companies and policies interested in extraction from rivers located in Indigenous territories – especially mining, the damage from which, in regions like the Amazon, is associated with drug trafficking and environmental crimes, including the assassination of Indigenous leaders and human rights defenders.<sup>1</sup>

Further invasive factors are rapid industrialization (Rabelo Quadra, Oliveira de Souza, Dos Santos Costa et al., 2017; Roveri, Guimarães, Toma et al., 2020), urbanization (Duarte-dos-Santos, Cutrim, Ferreira et al., 2017; Montagner, Jardim, Von der Ohe et al., 2014), and agriculturalization (Storck, Blank do Amaral, da Cruz et al., 2022). As the land's natural resources run out, the next in line for extraction are river basins and the seabed. With an example, knowing the length of the rivers (e.g. the Amazon, at 6,387 km; the Paraná, at 3,998 km; the Iguaçu, at 1,320 km) and the number of First Nations (ca. 300) in Brazil, one may realize the scale of the problem. Today in Brazil, there are more than 100,000 km of polluted and contaminated rivers (Montiel, 2023), while at the same time, river basins belong to the most important Indigenous areas. The 1977 Water Law (9433/97) attributed only economic value to water, while conveniently forgetting that a river's water also has ecological, social, cultural, and spiritual value.

The 1988 promulgation of the Constitution of the Federative Republic of Brazil did not amend this anthropocentric perspective (Arts. 170, 225), and the right to use rivers for economic purposes was reiterated (Art. 43). This right was also extended in the same way to Indigenous people (Art. 231). Rivers are generally protected, albeit only because of their economic value. In addition, Law No. 12651 of 25 May 2012, also known as the new Forest Code, established general rules on the protection of native vegetation; its original text was soon changed, however. Environmentalists' criticisms of these changes concerned, among other things, the reduction of riparian forests (on riverbanks), which would directly harm the life of rivers.

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1 Examples include the assassinations of Chico Mendes, Sister Dorothy Stang, and, more recently, journalist Dom Phillips and Indigenous activist Bruno Pereira in June 2022, not coincidentally while navigating the Itacoáí River in the Javari Valley, Amazonas, where their bodies were hidden.

Poland's river resources are proportionally more modest than Brazil's (the two longest rivers in Poland are the Vistula, at 1,047 km, and the Oder, at 854 km), but the scale of danger is comparable. Communities and activists have been campaigning for the legal personhood of Polish rivers since 2022, when nearly 90% of life in the Oder was destroyed by a massive golden algae bloom stimulated by saline discharges from mines (Szlagauer-Łukaszewska, Ławicki, Engel et al., 2024). The Polish Water Law of 20 July 2017 'rules the management of water by the principle of sustainable development, in particular the shaping and protection of water resources, the use of water and the management of water resources', but it has utterly failed in the face of the ecological disaster of summer 2022 (Sutowski, 2022).

### 3. Legal personhood for non-human entities

The legal personhood of corporate and organizational bodies, companies, municipalities, and so on has been recognized since ancient Rome in terms of 'business and non-business entities' (Patterson, 1983, p. 87), *universitas*, *societas*, and *corpus* with 'inherent and granted rights'. The 'Roman corporate formula saw these non-human legal entities afforded capacity of action, judicial capacity, proprietary capacity, and tortious capacity' (Gramitto, 2018, pp. 9, 11). Modern scholars have continued to confirm the conventional nature of non-human legal personhood: 'The corporation body (*Körperschaft*), as a real collective entity, is not only legally competent, but also capable of will and action' (Gierke, 1887, p. 603). To Dewey, 'what "person" signifies in popular speech, or in psychology, or in philosophy or morals, would be [...] irrelevant from the perspective of the real personality of corporate bodies' (1926, pp. 656–657). We mean here 'persons' other than physical human individuals (i.e. abstract and conventional ones); Gierke (1887) gave the example of a university able to act coherently as one organism. Conventionality means that the constitutionalization of legal personhood and standing (Stone, 1972), or so-called 'environmental constitutionalism' (Darpö, 2021, p. 11) for environmental entities, is not necessary. Also, there is no need to amend a constitution, which is a vital point of fact in instances where legal systems resort to this alleged barrier to prevent such changes (for instance, in Poland).

Since 2017, the Earth Law Center and the Universal Declaration of the Rights of Rivers have encouraged states, communities, and Indigenous peoples to take the initiative to legislate for the juridical personhood of rivers: 'Aware that all people, including Indigenous communities and other local communities of all spiritual faiths, have long held through their traditions, religions, customs, and laws that nature [...] is a rights-bearing entity, and that rivers in particular are sacred entities possessing their own fundamental rights', the Declaration states that all rivers are entitled to the fundamental rights to flow, perform essential functions within its ecosystem, be free

from pollution, feed and be fed by sustainable aquifers, and to have native biodiversity, regeneration, and restoration.

To ensure full implementation and enforcement of these rights, each river shall be entitled to the independent appointment of one or more legal guardians that acts solely on behalf of the river's rights and who may represent the river in any legal proceeding or before any governmental body empowered to affect it, with at least one legal guardian being an indigenous representative for those rivers upon which indigenous communities traditionally depend. (Art. 3)

The legal institutions capable of effectively implementing and enforcing these rights precisely include the legal personhood of a particular river. In turn, rights, interests, and capabilities make up the legal standing of the river (Putzer, Lambooy, Jeurissen et al., 2022). In this context, rivers should be defined as (a) integral organic-inorganic wholes (Universal Declaration of the Rights of Mother Earth, 2010) and (b) hydro-social wholes (to be discussed below). Indigenous people of the river basins play a prominent role in setting up this institution. Many countries have already granted inherent rights and legal personhood to certain rivers, following the voices of Indigenous citizens as both justifiers of the rivers' rights and 'guardians' or 'nature advocates' representing them *ad litem* (Takacs, 2020, p. 47–55; also see Eckersly, 2011; Berros, 2017; Blake, 2017). Brazil (Second Brazilian Forum on the Rights of Nature, 2023) and Poland (Bieluk, 2023; Bieluk, 2020) are struggling to achieve comparable legislation, with activists developing draft bills on legal personhood for the Oder, signing petitions, and appealing to legislators and the president (Osoba Odra, n.d.a; Osoba Odra, n.d.b).

#### **4. Indigenous narratives on rivers in Brazil**

In Brazil, despite 300 Indigenous groups and the enormous diversity of nature, socio-environmental narratives were for a long time overshadowed by colonial narratives. Many original narratives have only recently come to voice, as Indigenous people advocate for environmental justice while taking into account their right to their native *oikoi* and the rights of these *oikoi* as such (Sato, Silva & Jaber, 2014). A distinct voice of this kind belongs to the Yanomami people, who have a unique narrative regarding the birth of rivers. In the opening of the book *The falling sky*, the shaman Davi Kopenawa recalls how the rivers are linked to the very conception of the origin of his people. The Yanomami are descendants of the rivers: 'I am a child of the inhabitants of this land from which the rivers flow, of these people who are the children, sons-in-law, and daughters-in-law of Omama' (Kopenawa & Albert, 2013, pp. 12–13; also see p. 82). Omama is a demiurgic force responsible for the creation of the universe, said to have an intimate relationship with the aquatic monster Tépérésiki, the owner

of plants. The first shaman is Omaha's son; the voice of the father, therefore, guides him. For the Yanomami people, not only do rivers have spirits, but the shaman also establishes a direct relationship with them, and he can see the magnificent images of ancestral rivers (Kopenawa & Albert, 2013, p. 25). We can see how the Yanomami narratives reinforce the idea of rivers as their origin and, at the same time, express the idea that the voice of Indigenous peoples is nothing other than the voice of the rivers themselves, which speak through the shamans guided by the spirits (*xapiri*). Omaha tells us to care for and not destroy nature (Kopenawa & Albert, 2013, p. 24).

Ironically, just as rivers are sources of life, they can also bring death, as they are the path taken by colonizers (e.g. navigators and conquistadors like Vicente Yáñez Pinzón on the Amazon in 1500, missionaries, prospectors, and all the 'whites'): '[W]ithout our knowledge, outsiders decided to travel up the rivers and penetrated our forest' (Kopenawa & Albert, 2013, p. 17). It was through the river that the colonizers arrived, and with them, the epidemics. With the diseases, the Indigenous people die, and the shamans die, meaning they are no longer able to heal their people. The death of the river ultimately leads to the 'falling of the sky' precisely because there is no longer anyone to sustain it.

The origin story, in this case, transforms into a narrative of death, a story of destruction, according to which people die because the rivers and the forest have died. The Yanomami, deprived of their rivers that give them life, tell the story of their own death:

But the white people ignore that. They cut down and burn all the trees to feed their cattle. They dig in the beds of the watercourses and destroy the hills to look for gold. They blow up the big rocks that stand in the way of opening their roads. Yet hills and mountains are not simply put down on the ground, as I have said. These are spirit dwellings created by Omaha! But these are words that the white people do not understand. They think that the forest is dead and empty, that 'nature' is there for no reason and that it is mute. So they think that they can take it over to destroy the houses, paths, and food of the *xapiri* as they wish. (Kopenawa & Albert, 2013, p. 390)

These are narratives of a feeling of dread in the face of the death of nature, like Calmet's (2018) *solastalgia* (suffering from the degradation of nature and the loss of the sense of belonging to it) and the 'suffering of destruction', the opposite of 'topophilia' (Albrecht, 2019; Albrecht, 2020; see also Schultz, 2023). The meaning of these narratives of origins has been revived by Krenak, a Brazilian Indigenous writer. He states that rivers are endowed with a 'magical force', which is particularly evident in the case of the River Amazon, *who* (not *which*) 'carries in itself many other rivers, but also the water that the forest offers to the clouds, and that the rain returns to the

earth, in that marvelous cycle in which the waters of the rivers are those of the sky, and the waters of the sky are those of the river' (Krenak, 2022, p. 10).

It is worth noting that such Indigenous narratives consider rivers as endowed with life, spirituality, and personhood (Krenak, 2020a, p. 40; Krenak, 2022), shared with the whole of nature. Further, rivers are endowed with agency, which also explains their vulnerability to human intervention. According to Indigenous narratives, who (not what) are the rivers? They are the ancestors of the people native to the riverbanks; they are embodied beings capable of uttering (Krenak, 2020b, p. 20; Krenak, 2022, pp. 8–12).

Indigenous narratives regarding rivers as *persons* challenge Brazil's present-day legislative framework, which still deals with the problematic effects of the 'modern revolution' that both removed humanity from nature and disregarded nature's intrinsic vitality, validity, and personhood, thus setting the conditions for its exploitation (Krenak, 2020a, p. 49; Krenak, 2022, p. 12). By voicing rivers' identities and agency, Indigenous narratives provide an alternative path to imagining and designing our future beyond modern reductionism (Krenak, 2022, p. 8).

What do the rivers tell us? Rather than teaching us something about *them*, they help us understand *ourselves*. They mirror who we are and who we wish to become (Krenak, 2020b, p. 42). This entails substituting an ego-centred view of the subject with a relational one that is also capable of revitalizing and conscientizing humanity. 'Beyond the idea of "I am nature", the awareness of being alive should pass through us in such a way that we are able to feel that the river, the forest, the wind [...] are our mirror in life' (Krenak, 2020b, pp. 99–100). For this and related Indigenous narratives, one can easily find a philosophical *pendant*. Heidegger addressed dwelling with proximity and belonging to earth, as well as with caring for it, saying:

'on the earth' already means 'under the sky'. Both of these *also* mean 'remaining before the divinities' and include a 'belonging to men's being with one another'. By a *primal* oneness the four—earth and sky, divinities and mortals—belong together in one. Earth is the serving bearer, blossoming and fruiting, spreading out in rock and water, rising up into plant and animal. When we say earth, we are already thinking of the other three along with it, but we give no thought to the simple oneness of the four. [...] Mortals dwell in that they save the earth—taking the word [...]. Saving does not only snatch something from a danger. To save really means to set something free into its own presencing. To save the earth is more than to exploit it or even wear it out. Saving the earth does not master the earth and does not subjugate it, which is merely one step from spoliation. (1971, p. 147–148)

## 5. Indigenously inspired literary narratives on rivers in Poland: Olga Tokarczuk

Olga Tokarczuk joined the civic campaign I Recognize the Oder River as a Legal Person after the 2022 ecological disaster on the Oder (Szlauer-Łukaszewska, Ławicki, Engel et al., 2024). The Nobel laureate believes that the importance of the river for life, history, and culture cannot be fully articulated in ‘realistic or pragmatic language’. In contrast, the ‘metaphorical, analogous [...] totemic’ storytelling could unveil more. The essentials of the river can be identified 1) in its ‘natural structure’ and ‘natural community’ of the fluvial life, 2) in the language of the river and the creatures living in it, and 3) in the river’s ‘mythosystem’ and ‘some kind of spirit’ in which ‘we participate as humans’. She says that the Oder has a ‘memory’ and ‘a history to tell. [...] If only we could understand its language [...] The fish, the beavers, the birds would have a different, nonhuman but as powerful and significant story as ours’ (Tokarczuk, 2023, 4:27–11:50; 18:24–18:30; 19:24–19:38)<sup>2</sup>. Humans can hear the Oder’s voice insofar as they *are* nature. ‘It also gives life to various mythological entities’ (Tokarczuk, 2023, 17:55–17:57). However, it is not the river itself but human creativity that generates its unique sense in literature, art, and philosophy and that creates ‘new language’ and opens ‘new doors’ (Tokarczuk, 2023, 34:35–34:42) to ‘unveil something hitherto unnoticed’ (Tokarczuk, 2023, 36:46–36:49). Tokarczuk advocates new literature, philosophy and art that have already left behind dualistic assumptions about man and nature and develop new tools to revise our thinking about nature as something chaotic, worthless, or radically different from man. The writer herself sets out to find such a new point of view in each of her upcoming books.

Being native to the Lower Silesia and the Oderland, Tokarczuk believes that the river’s organism – its ‘wetlands, meanders and deadlands’ – transcends an individual animal or plant organism. This extended living totality embraces humans and communities that were supposed to exclude themselves from nature for centuries, according to anthropocentric and dualistic doctrines. ‘The river is our larger body [...] we unconsciously take part and are embodied in it [...] the body, the landscape, the environment is alive’ (Tokarczuk, 2023, 13:32–13:40). Similarly, the river itself is alive. She confides:

I have the same river in my memory and body cells [...] the blood vessel that carries water from the mountains [...] resembles a nervous system or a vascular system [...] an analogy to the liquidity of life itself, our position in the world. [...] Are they not the most natural lands in which we live, more stable than extremely

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2 The selection and translation of extracts from the interview conducted by Robert Rient with Olga Tokarczuk (2023) were made by the authors of the article. Once English subtitles appeared in the interview, the translation was revised.

fleeting states, politics, things invented by man? (Tokarczuk, 2023, 2:19–3:34; also see Tokarczuk, 2003 and 2022).

Tokarczuk further explains that the river's feminine nature derives from its watery element. Any technical perforation of the body of a river to regulate its current, bed, banks, etc. impairs its integrity. Noticeably, compared to many indigenous narratives, for Tokarczuk, the river – not the earth – is considered 'Mother', the 'maternal refuge', and the godlike 'power' (Tokarczuk, 2023; also see Finzer, 2015).<sup>3</sup> The Oder 'has no gender, yet she is relentlessly and unconditionally feeding and giving' (Tokarczuk, 2023), which characterizes the fertile, caring, feminine element. The feminist perspective is visible in Tokarczuk's association of the Oder's drying meanders and the old bed with passing and dying. Overregulation, exploitation, and contamination destroy the river's existence and identity.

In her essay *The power of the Oder*, Tokarczuk (2003) addresses the governance of the river. It is not time and space that govern it; it is the river who governs us and keeps the land in a stable, safe place. In *Flights*, she refers to the Oder as a viscountess compared to the Amazon, who is considered the queen of rivers: 'It wasn't a big river, only the Oder, but I, too, was little then. It had its place in the hierarchy of rivers, which I later checked on the maps – a minor one, but present, nonetheless, a kind of country viscountess at the court of the Amazon Queen' (Tokarczuk, 2017, p. 14). Tokarczuk gave both her native and her literary voice to the Oder to support the grassroots campaign in favour of granting the river legal personhood. Both native and poetic narratives are rooted in dwelling in *oikoi* (Peters et al., 2002). From Tokarczuk's narrative emerges the multiple yet non-anthropomorphic identity of the river in terms of an integral and inalienable Oderland to offer dwellings to humans and non-humans. The narratives dedicated to the Oder have usually been historical (Fontane, 1987), political (Ławicki, 2023), ethnographic (Herrmann, 1830; Horoszko, 1997; Simonides & Smolińska, 2018), or fictionalized (Springer, 2023).

In contrast, Tokarczuk displays the river as, to quote Smith, 'part of human culture, human religion, and daily life, and yet its influence is not a human invention. It is hydro-social' (i.e. it connects water with society while respecting inherent power relations) (2017, p. 2; also see Swyngedouw, 2009; Immovilli, Reitsma & Roncucci, 2022), as so many Indigenous stories depict it. Nevertheless, it is not about any water, but a specific river with which Tokarczuk identifies as a native dweller at a time when Indigenous identity narratives have been muted by the region's turbulent demographic history. Furthermore, for Tokarczuk, the river (and water) manifests its agentic and actantial features. As a sidenote, Latour (1996; 1998) posits that agency

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3 'To write about women and water is really impossible' (Kattau, 2006, p. 114); however, new materialist (Smith, 2017), ecofeminist (Darling, 2012; Gaard, 2001), and indigenous accounts promote hybrid ontologies.

can be extended to non-humans, called *actants*, thus removing the role of intent that is part of human agency. ‘In short, *water acts* [without intent]. Following Latour, *water is an actant*. Furthermore, other non-human things act upon water: other species, urban infrastructure, biogeochemical cycles, and so on’ (Schmidt, 2014, p. 221). In parallel, according to Indigenous wisdom, rivers and water manifest actantial features (e.g. Rosiek, Snyder, & Pratt, 2020). Relationships between the actants are complex and require effective legislation – without discriminating against water. After all, the law is relational in nature (Jeuland, 2023). The change in cognitive perspective towards nature in literary storytelling, philosophy, art – and science – addressed in Tokarczuk’s interview – clearly leads in the same direction: ‘the European tradition is that when we grow out of a law, then we write a new law [...] in the case of such a new law [...] it is effective to argue [...] we can also appeal and apply arguments such as I tried [...] to do, namely psychological, ecological, mythological, spiritual’ (Tokarczuk, 2023, 40:08–45:27).

## 6. Dwelling as an Indigenous capability

Capabilities can be identified and conceptualized when people embody a certain preference whose fulfilment is relevant to their well-being, flourishing, and quality of life (Nussbaum, 2006). Flourishing (i.e. active engagement with life and realization of human potential) rather than welfare (i.e. a judgement of how personally satisfying a result is for someone, its subjective utility) is supposed to be an indicator of justice. A distinct capability requires access to specific goods, opportunities, and entitlements. Not simply housing but rather *dwelling* belongs to humans’ key preferences, and its fulfilment can be critical. Dwelling may include material (e.g. utility, comfort, and luxury), environmental, relational (Deplazes-Zemp & Chapman, 2021), symbolic, cultural, spiritual, and existential values (Cloud & Redvers, 2023), as the previously mentioned Indigenous narratives demonstrated.

The Declaration on the Rights of Indigenous Peoples (United Nations, 2007) recognizes ‘the urgent need to respect and promote the inherent rights of Indigenous peoples which derive from their political, economic and social structures and their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources [as well as their control] over developments affecting them and their lands, territories and resources’. Accordingly, states shall redress for ‘any action which has the aim or effect of dispossessing them of their lands, territories or resources’ (Art. 8). The Declaration continues: ‘Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the Indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return’ (Art. 10). The UN also emphasizes that ‘Indigenous Peoples are in-

heritors and practitioners of unique cultures and ways of relating to people and the environment' (United Nations, 2023).

On the entitlement side, international conventions safeguard the Indigenous ability to dwell in native *oikoi*. However, only domestic legislation can effectively help to fulfil this capability. That said, it is possible to address the capabilities of nature itself. Although Nussbaum (2022) operationalizes a capability approach (CA) for animals, basic capabilities, such as a detoxification capability (Reid, Mooney, Croppe et al., 2005, p. 117) or the more general ecological health capability, can also be identified for vulnerable ecosystems, in particular hydro-social ones (Linde, Sjödin, Parida et al., 2021). These vulnerable ecosystems are inhabited by multi-species sentient creatures (Nussbaum, 2022). In aboriginal riverine ecosystems, a symbiosis of many human and natural capabilities occurs per se, and 'the capabilities of people [...] act in accordance with their esteem for natural entities' (Deplazes-Zemp et al., 2021, p. 21).

Although legislation should safeguard this accordance from discord, it is deficient if it does not protect greater and integral *oikoi*. 'The by-products of our industrial life do harm to many species, including our own, but at what point does this rise to the level of wrongful damage?' (Nussbaum, 2022, p. 51). Because an *oikos* and its dwellers can suffer harm and injustice, they need a 'multivalent justice' (Edwards, Reid, & Hunter, 2016) that is sensitive to individual *and* joint capabilities. At the same time, collective and shared capabilities are 'more than the sum capabilities' (Schlosberg & Carruthers, 2010, p. 17). The latter aligns with the original CA limited to individuals – however, 'environmental injustice is not simply an individual experience' (Schlosberg & Carruthers, 2010, p. 17). Ecosystems with juridical personhood get individualized status within a pluralized justice system (Schlosberg, 1999).

## **7. Justifying legislation for water due to its actantial features**

In general, the justification for legislation in favour of granting legal personhood to a river can be at least twofold. First, it can be top-down, and within that, it can be 1) international, in terms of the Declaration on the Rights of Indigenous Peoples (as shown in the previous section), and 2) constitutional, if the constitution already imposes certain obligations on citizens. Second, granting legal personhood can be bottom-up, communal, and democratic, once the constitution obliges each citizen to care for their environment. This is the case in Poland (Art. 86 of the Constitution of the Republic of Poland). Thus, if the effective form of care is to grant legal personhood to environmental entities, then a bottom-up initiative to legitimize the legislation will implement the constitution. Both justifications would meet halfway if a law granting juridical personhood to a river were enacted. Even if the state legislature enacts laws excluding the interests of native populations and their *oikoi* (Abers & Keck,

2013; Oliveira, de Souza, Vasconcelos et al., 2023), such as distinct aquatic ecosystems, these same Indigenous populations can autonomously initiate the enactment of appropriate legislation. Such a solution, in terms of constitutionalism, federalism, and legal pluralism, has already been implemented in several states to break with ‘the legal Anthropocene’ (Burdon & Martel, 2023).

Regarding the legal personhood of rivers and their rights, at least two approaches can be distinguished. The first is a right in the sense of a wild right, e.g. one that allows the river to take its natural, unregulated course. This option would correspond to Earth jurisprudence, according to which the latter ‘is not a human creation [...] it is “natural”, something that already exists in nature. An Earth jurisprudence is implicit in the laws of nature’ (Bell, 2003, p. 77). However, many rivers have already been regulated and cannot be returned to their natural shape. A second approach is thus the hydro-social account, which is similar to accounts present in Indigenous narratives and related philosophies. ‘The moderns think they have succeeded [...] only because they have carefully separated Nature and Society [...], whereas they have succeeded only because they have mixed together much greater masses of humans and nonhumans’ (Latour, 1993, p. 41; also see Latour, 1998).

When it comes to juridical personhood and legal entitlements for natural entities, there is no need to follow Latour’s idea of ‘the Parliament of Things’ and a ‘transcendental constitution’ (1993, pp. 84, 144), for they programmatically have no effect on legal institutions. Following the route of hybridization and pluralization of law would be democratic enough if achieved through legal personhood for rivers based on native inhabitants’ narratives. ‘Natures are present, but with their representatives, scientists who speak in their name. Societies are present’ (Latour, 1993, p. 144; see also Descola, 1993; Whiteside, 2013).

Canadian, Australian, and Brazilian pluralist legal systems show affinities with Latour’s constitution, which ‘does not separate us significantly from others’ (Latour, 1993, p. 107; see also Bowles et al., 2019), when it comes to rivers’ (and water’s) actantial features.<sup>4</sup> Nonetheless, appropriate legislation is needed to preserve multi-source socio-environmental justice (Schiff Berman, 2020; Norman, 2014). Also, a pluralist legislative agenda would herald the depoliticization of granting rights to nature (Bellina, 2024; Latour, 1998). Granting juridical personhood and specific rights to rivers has a thoroughly transformative potential. Among other things, it proves that people (without excluding anyone) and nature have the right to persist and grow, that the new legislation effectively protects all these entities, and that such hybrid legislations can develop (Willems, Lambooy, & Begum, 2021, p. 10).

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4 It is worth mentioning that the legal systems in Brazil and Poland are based on the civil law model. As a federation with numerous First Nations, Brazil has additional foundations for legal pluralism (Parola et al., 2019; Ryan, 2020).

## Conclusions

We have strived to demonstrate that native (Indigenous) narratives on dwelling in and symbiosis with their riverine *oikoi* are *vehicles* of their essential life forms and functioning, identities, vital interests, and rights. All narratives are intertwined with the river's inherent and relational features, values, and rights. We have also addressed *dwelling* (see United Nations, 2008) as proximity and belonging to a distinct native *oikos* and a relevant capability (Yap & Yu, 2016). We have reasoned that Indigenous narratives comprise valid justifications for granting legal personhood to rivers and for reinforcing Indigenous peoples' rights to choose a riverine habitat – a right that covers a distinct capability and protects individuals and communities from displacement, identity erosion, and so on, which manifests when an anthropocentric (and in particular an economic) approach to nature prevails.

In his *Imperative of responsibility*, Jonas (1984, p. 8) asks about the possibility of a *right* specific to nature. For him, the evidence shows that asking this question has ceased to be absurd. Giving rights to nature requires a new vision of ethics (with 'green' care, capabilities, and responsibility at the forefront) and, obviously, law and legal practice. It is no longer just about human good, but about the inherent good of everything that, in his words, has 'ends in itself', meaning everything that lives but also, we can add, the beings that are directly connected with life, such as the rivers. Hearing 'a silent plea for sparing its integrity' (Jonas, 1984, p. 8) is part of the new moral and legal obligations of all those who realize the seriousness of the facts of the environmental emergency that affects all beings – humans and non-humans alike.

What are the core benefits of juridical personhood for a river? Above all, it affords legal competence, including articulation and defence of a river's interests, rights, well-being, and capabilities in court processes (Cano, 2018) and entering contracts. Juridical personhood means that the river is no longer regarded as a *thing*, significantly changing its ontological and normative status. This results in two practical correctives: first, the river cannot be reduced to private property, capitalized and exploited (Kramm, 2020, p. 312). De Vries-Stotijn, van Ham and Bastmeijer (2019) argue that property rights can protect bodies of water effectively against expropriation. Considering, for example, President Joe Biden's initiative to conserve 30% of US waters and lands by 2030, at the cost of displacement and expropriation of native inhabitants, the question of property rights is essential. The second practical corrective concerns the river being reintegrated in and returned to its socio-environmental context, ensuring that industrial, agricultural, and urban actors respect its status, rights, and capabilities. By association, the way a river is regarded and managed undergoes a shift from anthropocentric to eco-centric justice, with a focus on ecological and 'hydropolitical vulnerability' (Wolf, 2007, p. 64). Recall the risk of disputes over trans-boundary waters, as between the Brazilian and Paraguayan communities affected by the Itaipu Dam on La Plata (Wolf, 2007, p. 55; also see Norman, 2014).

It is worth noting that Poland is currently one of the most water-poor countries in the world (Zalewski, 2024). Granting legal personhood to its rivers is a timely paradigm shift. As a comprehensive normative effect, ‘a shift from a philosophy of control and dominion over nature, and its legal system of property rights regimes, to a relationship of understanding and respect for the Natural Laws’ (Horinek, 2014, p. 13) would engender environmental legal personhood. This shift would seriously challenge anthropocentric accounts of jurisprudence in Poland or any nation with a sufficient forward-looking vision to afford rivers (and, in fact, any aquatic ecosystems threatened by humans; see Pacific Islands Forum, 2022) agentic and actantial features.

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## Navigating Legal and Cultural Intersections: The Impact of Law on Minority Traditions and Identity

**Abstract:** States should establish in their legislations protective mechanisms which, on the one hand, guarantee the realisation of the rights of the majority and, on the other hand, ensure respect for the traditions, culture and customs of national and ethnic minorities. In Poland there are such guarantees that ensure that minorities can live in accordance with their own traditions and customs, also at the highest normative level. In addition to the legal sphere, one should not forget the equally important sphere of social life, which for some people is even more important. The issue of early marriage in the Roma community is an exemplification of the problem that can be caused by the interference of subject law norms with the centuries-old traditions and customs of a particular national or ethnic group.

**Keywords:** customs, identity, law, minorities, Roma, traditions

### Introduction

It will not be revealing anything new to say that one of the distinguishing features of modern societies, including in Europe, is their multiculturalism. Living in one country, in other words living ‘side by side’, with people of different nationalities, from different cultures and coming from different traditions is commonplace today. Interestingly, however, multiculturalism itself is nothing new. If we assume that this phenomenon consists precisely in the coexistence of different ethnic, national and religious groups in each area, originating from different traditions and

cultures (Jaskuła, 2015; Śliz & Szczepański, 2021), then its origins can be found even in the time of the pharaohs, in the Greek world or in the Roman Empire (Szlachta, 2022, pp. 19–20). Today, however, serious threats to multiculturalism are increasingly noted. While critical voices are not new, they have recently assumed great importance again, especially due to the troubling problem of migration in Europe (Burdiak, 2021; Doliwa-Klepacka, 2021; Kużelewska & Piekutowska, 2021; pp. 153–171). However, it is worth remembering that problems within multicultural societies can affect both sides, the host society as well as the minority group. Therefore, in connection with the mixing of societies, states should establish in their legislation protection mechanisms so that, on the one hand, the rights of the majority are guaranteed and, on the other hand, national and ethnic minorities can preserve their traditions, culture and customs.

## **1. Normative guarantees for the protection of national and ethnic minorities**

The development of multiculturalism itself ‘is safeguarded by various guarantees found in almost all human rights conventions’ (Sykuna & Podolska, 2022, p. 123). At the international level, certain rights for minorities are guaranteed, for example, by Article 27 of the International Covenant on Civil and Political Rights, which states: ‘In States where ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be deprived of the right to have their own cultural life, to profess and practice their own religion and to use their own language with other members of the group’ (quoted in Suchocka, 1991, p. 141 ff.). On an individual level, the protection of members of minorities will consist primarily of respect for the dignity of the individual, and thus also his or her origin, freedom of thought, conscience and religion.

Equally important are the prohibition of discrimination and rights of a cultural nature. The emanation of this aspect is the granting of equal rights to all. In the collective dimension, multiculturalism is safeguarded by, for example, the right to national self-determination or the possibility to cultivate the identity of a given minority (Sykuna & Podolska, 2022, p. 123).

In the system of Polish law, starting with the 1997 Constitution of the Republic of Poland, which is highest in the hierarchy of sources of law, it can be assumed that national and ethnic minorities have their constitutional position guaranteed. Indeed, in Article 35(1) and (2), the Polish Constitution stipulates that ‘[t]he Republic of Poland guarantees Polish citizens belonging to national and ethnic minorities the freedom to maintain and develop their own language, preserve their customs and traditions and develop their own culture’ and ‘[n]ational and ethnic minorities have the right to

establish their own educational, cultural and religious institutions and to participate in the settlement of matters concerning their cultural identity'. The norms that can be decoded from this provision should be self-evident, especially if we consider them in the context of human dignity. It is rightly argued by Czarny that:

the special protection of the rights of persons belonging to national and ethnic minorities is very closely linked to the imperative to respect the dignity of the human person and the resulting principle of individual freedom [...] an element of respect for human dignity is the recognition by the state of the right of the individual to freely define his or her identity in terms of national and ethnic affiliation, as well as its externalisation. (Czarny, 2016, p. 890)

In the absence of protection for minority groups in the republic, it would be difficult to imagine the implementation of the rule of law. This protection is more effective because Article 35 of the Constitution has the character of a direct provision, for the application of which there is no need to refer to separate laws (Skrzydło, 2000, pp. 47–48).

In Polish literature, it is assumed that the indicated normative provision in the system of regulations on individual freedoms and rights has a threefold function. Indeed, Lech Garlicki points out that:

Firstly, it should be treated as one of the general principles of this system. In this sense, Article 35 expresses the principle of tolerance and respect for national and ethnic minorities, thus also formulating one of the constitutional values. [...] Secondly, it should be treated as a norm specifying the preceding provisions of Chapter II. This specification relates, on the one hand, to the subjective delimitation of the circle of action of freedoms and rights, because Article 35 creates a separate category of subjects and gives them a special constitutional status; and on the other, to the principle of equality, because Article 35 grants special rights to national and ethnic minorities (the persons who constitute them), and thus orders these subjects be treated differently, according to the concept of compensatory preference.

Thirdly, it is to be regarded as an expression of specific subjective rights, enumerated with regard to the individual (persons belonging to a minority) in paragraph 1, and with regard to groups (minorities as such) in paragraph 2. This makes it possible to analyse these provisions in accordance with general methods of dissecting provisions on subjective rights. (Garlicki, 2003, pp. 7–8)

Apart from the above-mentioned principle of the protection of national and ethnic minorities, we can also find another principle in the Polish Constitution: the equality of all citizens before the law. This study does not aim to make a detailed analysis of both these principles on the grounds of Polish law; however, it should be

pointed out that they belong to the basic ‘normative canon’ of a democratic state of law. Therefore, it is worth asking whether there are situations in practice that force people to verify the principle of equality.

Leaving aside the discussion on positive discrimination, even with a cursory comparison of the two principles mentioned above, a further question arises as to whether there is a phenomenon of superiority and inferiority between these principles. Breaking away for a moment from considerations based on Polish legislation, it should be considered more generally, and in principle theoretically, whether a minority that is guided in its conduct by a time-honoured tradition should give it up due to lack of acceptance by the state in which it has settled. After all, is it possible to sacrifice a tradition that has been cultivated for centuries and to conform to the majority’s standards simply because one represents a minority? Or should it be otherwise, perhaps the law of the state in which a minority group is settled should take into account the validity of specific norms shaped by customs and cultural habits, if only at the expense of the principle of equality of all before the law? In these considerations, it is also worth reflecting on the limits of minority protection. The question is: To what extent should the ‘host state’ ensure all the freedoms of its citizens who nevertheless belong to national and ethnic minorities? It also seems reasonable to ask whether a democratic state under the rule of law is obliged to accept and protect all customs practised by individual national and ethnic minorities. Perhaps only those customs which are accepted but not necessarily applied by the majority should be protected? How far, then, should the state protect its citizens who are concentrated in an ethnic or national minority? How, in the event of differences, should the interests of both the minority and the majority of citizens living in the state be balanced? What stance should be taken with regard to the customs of national and ethnic minorities which, although derived from centuries of tradition, are in conflict with the law? (Sykuna, 2008; Sykuna, 2009; Sykuna & Zajadło, 2007).

The legal system should protect minorities and, as we have pointed out, in Poland there are such guarantees, even at the highest normative level, which ensure that minorities can live in accordance with their own traditions and customs, also affecting the cultural identity of an individual. Indeed, it is worth emphasising that the right to cultural identity belongs to everyone, and its source can be found in human dignity (Wojciechowski, 2022, pp. 133–152). In addition to the legal sphere, one must not forget the equally important social sphere, which for some people is even more important. This is related to the issue of belonging to a certain group which enforces certain behaviours. The fact that someone belongs to a certain ethnic minority does not exclude the fact that, living in a certain country, he or she will interact with people from other groups (which is an important element of the definition of multiculturalism) or even want to belong to those groups. In this case, the problem of maintaining one’s own identity may arise, because belonging to a particular or new group, even a peer group, may involve having to accept different rules than those which the per-

son in question followed in his or her previous community. It would not be an exaggeration to say that young people, especially during adolescence, have the greatest problems with their own identity; we do not just mean their sexual maturity, but any issues related to their lives. Particularly in this regard, we are interested in young people's identification with their family or, even more broadly, with their family environment of origin. However, this origin can sometimes be quite burdensome for young people, especially if the family requires them to conform to or merely accept certain behaviours that are characteristic of their environment but uncommon among the majority. Observation of young people, especially teenagers, leads to the conclusion that very often, the desire to belong to a peer group is so strong that it can even win out over their own family environment. Indeed, the main factor influencing young people's decisions is their need for acceptance by their peers; the desire to be in such a group, to belong to it and to gain its acceptance sometimes leads to great sacrifices on their part. In certain situations and environments, in order not to be excluded or even ridiculed, young people make very dramatic choices. Sometimes they even renounce their own traditions and origins, and sometimes they only try to reconcile their own tradition with the behaviour of the majority.

## **2. Exemplification of the problem through the case of early marriage in the Roma community**

One of the minorities that has inhabited large parts of many countries for centuries are the Roma (Mirga & Mróz, 1994). This diaspora has also been quite significant in Poland for centuries due to the number of members of its community (Mróz, 2001). It will not be an exaggeration to say that the Roma minority, like other minorities, especially among its younger generation, faces certain problems of belonging or even cultural identity (Wojciechowski, 2023). Living in any of the European countries, the Roma are subject to all the norms of positive law, just like other citizens. Unlike the latter, however, their lives and conduct are also determined by norms specific to their national minority (Sykuna, 2008; Sykuna, 2009). This applies to family life, the obligations of marriage or even the marriage itself.

Importantly, in the case of the Polish Roma, their community has been facing numerous problems for years, the root of which is the conflict between their centuries-old traditions and the customary standards of most of society. Moreover, sometimes this conflict is compounded by various legal issues. In Poland, such a situation arises, for example, in the case of marriages concluded by the Roma. Directly related to this is also the problem of early sexual contact that can occur between girls and boys from the Roma community, which in certain cases even leads to a violation of the applicable norms of the Polish Criminal Code. It is therefore worth taking a closer

look at the issues mentioned in connection with the previously indicated problem of multiculturalism.

There are two equivalent forms of marriage in Polish law; the first is based on Article 1 § 1 of the Family and Guardianship Code, i.e. so-called civil marriage, and the second based on Article 1 § 2 of the Family and Guardianship Code, defined as a marriage governed by the internal law of a church or another religious association with consequences in the sphere of civil law. Hence, despite the commonly used expression ‘religious marriage’, we are only dealing with a form of marriage that is different from the secular version. Without going into the details of all the prerequisites for marriage, in the context of the considerations made in this article, it is nevertheless necessary to mention the minimum age of the parties to the marriage: according to the rule expressed in Article 10 § 1 of the Family and Guardianship Code, both the man and the woman should be at least 18 years old. However, for important reasons, the guardianship court may permit the marriage of a woman who has reached the age of 16 where the circumstances indicate that the marriage will be compatible with the good of the established family. The literature indicates that these important reasons should be assessed considering the good of the family, looking at each case individually and the totality of the relevant circumstances (Piasecki, 2002, p. 69. On the rules of marriage in Polish law, also see Chwyć, 1998; Haak, 1999; Piasecki, 2011; Smczyński, 2014, p. 92 ff.).

With regard to further considerations, it is also worth recalling, albeit briefly, the basic elements of the ceremony during the celebration of a marriage, particularly, however, in the case of a marriage celebrated in the Catholic Church. Interestingly, other prerequisites for the validity of marriage can be found in some of these elements. Given that, according to the liturgical rite, the sacrament of marriage is celebrated at Mass, the main part of the joining of the future spouses takes place after the homily. A clergyman – usually the parish priest – questions the bride and groom about their wish to marry and to be faithful, and to have and bring up children. (Exceptionally, according to Canon 1116 § 2 of the Code of Canon Law, in the case of danger of death, another clergyman may intervene at the conclusion of the marriage.) Then, with their hands entwined in the priest’s stole, the future spouses make a declaration of intent to marry at the same time; it is assumed that if they are mute, they may sign the marriage formula in the presence of the clergyman, or they may express their wish to enter the union by other signs. The clergyman confirms the union, takes off the stole and blesses the rings, which are a symbol of the sacrament. As they place them on each other’s fingers, the spouses again speak words testifying to their love and fidelity (Balwicka-Szczyrba, 2019; Góralski, 1998; Góralski, 2011; Sobański, 2003; Szadok-Bratuń, 2013; Tunia, 2023; Zabłocki, 1999).

A certain similarity in terms of marriage ceremonies exists in the Roma community. Its members, as Polish citizens, are necessarily subject to the laws in force in Poland. However, as Roma, they feel subjectively bound by the customary impera-

tive stemming from centuries of tradition, which allows marriages to be concluded at a very early age, even before coming of age. It is difficult to pinpoint precisely when young Roma are ready to live together; the problem is that the environment, parallel to the norms resulting from their centuries-old culture, is subject to the civilisational influences of the country in which the group resides. It also happens (even quite often) that it is not the partners themselves but their parents who decide whether the young people have already reached a sufficient age for marriage. Despite various age limits cited in the literature, it is most often assumed that 13-year-old girls and 16-year-old boys are ready to get married (Ficowski, 1989, p. 80; Kowarska, 2005, p. 103).

The wedding rite is preceded by a period of preparation, during which the families of the future spouses play a significant, and sometimes the most important, role. Here too, however, there is a lack of uniformity in the ways in which young people are brought together. Often it is the parents who decide on everything, but sometimes the interested parties themselves take the initiative to get married. Although young Roma people can choose three forms of marriage in Poland, i.e. civil, church and traditional, in their community the traditional wedding, called *mangavipen* (Kowarska, 2005, pp. 116–117), is considered the most important (though it does not have any consequences from the perspective of Polish civil law). It is concluded by young people even before they reach the age of majority. What is more, the Roma quite often skip the first two forms of marriage provided for by Polish legislation altogether, which is already legally possible, remaining throughout their lives in unions based only on the traditional oath (Kowarska, 2005, p. 117). It can therefore be concluded that in this situation, from the point of view of Polish law, we are dealing with a typical cohabitation.

The wedding ceremony is attended by the parents and family of the young couple (Bartosz, 2004, p. 193). The entire course of the *mangavipen*, despite minor differences due to the distinctiveness of individual Roma groups, is determined by predominantly similar customs that flow from centuries of tradition. First, a designated member of the elders, a person of authority in the community, instructs the future spouses on the responsibilities that come with the institution of marriage. He then ties a special shawl on their hands. Sometimes it is considered sufficient for the nuptial act to tie the hands with a simple ribbon, string or even an apron, preferably in red (Kowarska, 2005, p. 118). After the public and voluntary declaration of the spouses' readiness to live together as a couple and the acceptance of the union by their parents, the young couple is doused with vodka or champagne and sometimes tossed up in the air (Kowarska, 2005, p. 118).

In some Roma clans or groupings, such as among the Kełderasz, the ceremony of the wedding itself is preceded by a rite known as *tumnimos*, or a conspiracy. In this ceremony,

which takes place on neutral ground (not at the bride's or groom's father's house), only men take part; the bride and groom cannot be present. The bride's father arrives first, accompanied by men from his family, and awaits the arrival of the groom's father and his companions. The negotiations begin with the father of the bridegroom presenting the *daro*, i.e. the size of the payment for his wife in *galbs* (gold ducats or dollars). The size of the *daro* has already been decided in advance. The *daro* is counted by all the men present. By accepting the *daro*, the father of the bride approves the marriage. The father of the groom then shows everyone the ceremonial bottle of vodka, the so-called *ploska*, to which a red scarf, the *diklo*, is tied. To it are pinned gold earrings – a wedding gift, a *capara*. The shawl and earrings are intended for the girl. If she accepts them (the shawl is a symbol of the conjugal state), it means that she consents to the marriage; if she returns the gift through someone, it means that the wedding ceremony is broken and requires her father to return the *daro*. The two fathers then each drink a glass of vodka from the *ploska*, saving the rest for the wedding feast – the *biav*. The *tumnimos* ceremonies end with a feast, the *paćiv*, given by the father of the groom. (Mirga & Mróz, 1994, p. 256)

There is also information in the literature about the buying or kidnapping of future wives. Ficowski (1989, p. 78) points out that the former custom, practised by the Lowars and the Kelderasz, was basically discontinued after the Second World War. Wife kidnapping, on the other hand, still happens today, even among Polish Roma (Ficowski, 1989, p. 79). In principle, this has little to do with violence or surprise, as the young agree in advance to run away together and on their return, declare to their families that they have spent the night together. According to Roma customs, such a fact is tantamount to a marriage (Ficowski, 1989, p. 79).

Mirga and Mróz, referring to nineteenth-century authors describing the marriage customs of the Roma, aptly summarise that the essential elements of these customs are:

the age of the spouses – 12 to 15 years – endogamy, avoidance of marriages of too close relatives (first-degree kinship), the role of the gypsy elder, the civil nature of the union, the child as a source of the permanence of the marriage, the woman's infertility as a reason for breaking the marriage contract [and] the occasional nature of the conclusion of church weddings. (1994, p. 254)

We can take as a case study the example of one of the inhabitants of Lower Silesia, Marek K., who seems to have chosen the traditional way, in the Romani sense of the word. In 2003, at the age of 18, in line with the tradition, he married his chosen one, also from a Romani family, who was not yet 15 on the wedding day. It is also worth mentioning that less than a year after this momentous event for the young couple, a child was born.

Considering the above incident according to the rules of Polish family law, it is easy to conclude that the young Roma at the time of the nuptials did not meet the prerequisites for the required age as set out in Article 10 § 1 of the Family and Guardianship Code. Moreover, since there was sexual intercourse with a person under the age of 15, it seems clear that there was also a violation of the norms of Polish criminal law. Indeed, according to Article 200 of the Penal Code, '[w]hoever has sexual intercourse with a minor under 15 years of age or engages in another sexual act towards such a person or leads such a person to submit to such an act or to perform it, shall be subject to the penalty of deprivation of liberty for a term of between 2 and 12 years'. In addition, the Polish legislation for the offence in question does not allow for the erasing of a custodial sentence without conditional suspension of its execution.

The case of Marek K. came to light when, following a probation interview, a criminal complaint was filed. In the indictment, Marek K. was charged with committing an act under Article 200 § 1 of the Criminal Code. From the very beginning of the proceedings, the suspect (later the accused) did not deny the alleged circumstances in any way. It transpired that in 2003 Marek K. did indeed marry his chosen one in accordance with Roma tradition, and a year later a child was born to them. As a result of the proceedings, Marek K. was found guilty of an act that the court classified as an offence of sexual intercourse with a person under 15 years of age. On the basis of Article 200 § 1 of the Criminal Code, Marek K. was sentenced to eight months' imprisonment. At the same time, the court suspended the sentence for a probation period of three years and placed the defendant under probation supervision for that period.

From a criminal law perspective, the matter described seems clear and obvious. However, one might say it has a certain cultural 'second level'. As a citizen of the Republic of Poland, Marek K. is subject to Polish law, but certainly as a member of the Roma community, he feels bound by the moral imperative stemming from tradition, according to which it is permissible to marry at a very early age – ergo to have sexual intercourse at an equally early age.

The above case reverberated very widely throughout the Roma community. The reaction to the court verdict was the issuing of an official statement by the Roma Association in Poland, which included an appeal to respect their tradition, 'one of whose elements is the practice of very early marriage of women' (Roma Association, 2007). Referring to the content of the Polish law on national minorities, it pointed out that the specificity and cultural and moral distinctiveness of the Roma had not been considered with regard to this case. Furthermore, while making it clear that the Association in no way wished to interfere in the procedure provided for by Polish law, it was hoped that this individual case would not become an impetus for the initiation of similar lawsuits targeting members of the Roma minority in Poland (Sykuna, 2008).

The concerns of the Roma community may indeed be justified, given that the practice of early marriage of young Roma women is quite common. Therefore, the publicity surrounding the case of Marek K. may inevitably cause the Roma tradition

to be associated with one of the worst crimes. An additional problem arises in the analysis mentioned above of the construction of the offence under Article 200, especially in connection with Article 106a of the Penal Code; however, a detailed consideration of the premises of the described act would exceed the framework of this article. It suffices to point out that in a situation in which the court would sentence the offence in question to imprisonment without conditional suspension, the Penal Code does not allow for the possibility of its abolition. The provision of Article 106a was introduced as a result of amendments to the Penal Code made in 2005; it is worth noting at this point that the addition of this article was met with numerous comments from the perspective of the doctrine of criminal law. Its controversial nature was emphasised, as it contradicts the principle of humanity and seems unreasonable in view of the principles of penal policy (Bogdan, 2007, pp. 1113–1114; Marek, 2007, p. 243; Mozgawa, 2007, p. 212).

Interestingly, this case was similar to a whole series of problems that US courts were already examining during their proceedings in the 1980s; the parties in these trials also belonged to ethnic or national minorities living in the United States. Moreover, although the acts they were accused of were contrary to the applicable law, they found justification in the customs and traditions of these minorities. For example, *People v. Moua*, which was tried in California in 1985, concerned a Lao man from the Hmong tribe who, in accordance with the custom of the ethnic group (*zij poj niam*, marriage by capture), kidnapped his chosen one in order to get married (Golding, 2002, p. 148; Gordon, 2001, p. 1813 ff.; Phillips, 2003, p. 511 ff.). Another case concerned specific behaviour among members of the Albanian minority in the USA.

In Anglo-Saxon legal culture there is a concept, or perhaps even an institution, referred to as the cultural defence (Sykuna & Zajadło, 2007). It has found application not only in the examples cited above, but also in many others, and also outside the field of criminal law (Dundes Renteln, 2004). It is most often assumed that it can be generally referred to in situations in which the authority applying the law takes (or does not take) into account the validity of specific cultural norms in a certain social group which deviate in a significant manner from the accepted general social standards (Van Broeck, 2001, p. 5). A cultural defence is taken in a narrow or a broad sense depending on the type of case to which it is applied. The former is linked only to criminal proceedings; in this sense, cultural defence refers to a certain type of legal or juridical strategy used in criminal proceedings. It consists in using the argument of the offender's membership of a specific cultural group in order to exclude or limit his/her responsibility or to mitigate the threatened punishment for the act in question (Wu, 2003, p. 981 ff.). In a broader sense, however, the concept can also be extended to entire branches of law and other types of proceedings, such as civil or administrative proceedings. For example, in *Friedman v. State*, the institution of a cultural defence emerged as an argument in favour of awarding damages to a plaintiff for personal injury (Dundes Renteln, 2004, p. 53 ff.). Cultural considerations are

also invoked by asylum seekers in the current administrative procedure in the United States. It is worth mentioning that in these cases, however, the cultural defence argument is all too often abused. Indeed, in order to strengthen the justification of their applications, emigrants refer to various cruel but fictitious customs in force in their countries (Dundes Renteln, 2004, p. 53 ff.).

Particularly in the context of a multicultural Europe, a defence through culture is likely to be increasingly used and is undoubtedly a challenge, as some authors already pointed out more than a decade ago (Sykuna & Zajadło, 2009). Although the framework of this study does not allow for a detailed analysis of the cultural defence in Poland, it is worth pointing out at the end of these considerations that this concept has already entered Polish legal language on a permanent basis, especially in the context of criminal law (Bek, 2018; Bojarski & Leciak, 2012; Kleczkowska, 2012).

## Conclusion

The issue of early marriage in the Roma community is only an exemplification of the problems that can be caused by the interference of subject law norms in the centuries-old traditions and customs of a particular national or ethnic group. Objectively, the norm of Article 200 of the Polish Criminal Code is extremely important, necessary and by all means desirable in a state of law, as it safeguards the rights of minors. However, our aim is to point out that it may happen that, on the one hand, the law, understood as a whole system of norms, supports and ensures the freedom of citizens belonging to national and ethnic minorities to preserve their customs and traditions and to develop their own cultural identity, while, on the other hand, from a certain aspect, it may equally interfere with them. Consequently, this can lead to the aggravation of identity problems within minority groups.

In addition to the law, social factors, such as the peer group imperative, can also contribute to the weakening of bonds within minorities and, at the same time, lead to their members losing their own identity. Although the latter phenomenon should be further explored in detailed sociological research, it can be pointed out here, in conclusion, that especially among young members of various minorities, the social factor seems no less important than the legal one.

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## Subjective Identity and the Right to be Forgotten: A Multifaceted Claim in the Legal System

**Abstract:** In the complex relationship between individual identity and its claims for recognition and protection by the legal system, the right to be forgotten is crucial, because it addresses a personal, social and legal definition of the individual as authentically as possible and highlights the uniqueness of each identity, with changes experienced in the temporal dimension. The lack of distinction in real life between the physical world and the analogue context traces new spatial and temporal coordinates, able to profoundly redefine the traditional categories of identity and difference, as well as to modify the usual dynamics of personal and social inclusion and exclusion, submitting identity to a process of dismemberment that makes the individual a complex ‘informational organism’. The multiple connections between the right to be forgotten and the protection of personal identity are confirmed by the most recent developments of European legislation and, in particular, in Italian jurisprudence, which outlines it as an identity claim in order to obtain a correct representation of oneself, resulting in the guarantee offered by the legal system of reconfiguring one’s telematic image. This describes an evolving and comprehensive right capable of protecting the originality of the individual and his/her representation and relationships.

**Keywords:** digital data, digital identity, identity, legal system, memory, right to be forgotten

### Introduction

This essay aims to outline, alongside analogue and digital action, two different but related concepts of personal identity. This will then be analysed as an evolving idea which is referable to multiple personality rights: in this context, the right to be forgotten arises between the right to the protection of personal data and the right to personal identity on the Internet, representing a multifaceted claim in the legal sys-

tem. The examination of the right to be forgotten will start from the main EU and Italian regulatory and jurisprudential sources.

Although human identity and experience are found in an evident lack of distinction, in real life, between the physical world and the analogue context (Floridi, 2017, p. 67), the virtual can be defined by characterizing terms such as deterritorialization, decentralization, destatutalization and data surveillance (Amato Mangiameli & Campagnoli, 2020, p. 3); these expressions obviously do not indicate mere abstractions but outline new spatial and temporal coordinates, capable of profoundly redefining the traditional categories of identity and difference. In addition, the same elements lead to an overcoming, at least on a formal level, of the usual dynamics of personal and social inclusion and exclusion, given that every element of reality appears potentially reproducible and shareable on the Web. The latter, in fact, shows itself to be indifferent to traditional space-time delimitation criteria, being able to eliminate both the future, understood as a contingency (Han, 2022, p. 9), and the stability of the past as a source of commitments (Han, 2022, p. 13), punctuated by the ubiquity of instantaneous contacts (Amato Mangiameli & Campagnoli, 2020, p. 10). ‘*Only the moment counts. Not even his “story” is a story in the proper sense of the term. It is not narrative, but additive. It ends in a series of snapshots. Digital time disintegrates, becoming a simple succession of an episodic present*’ (Han, 2022, p. 46). Virtualization therefore shifts the centre of reflection from the solution to the problem, ensuring that virtual identity finds its essentiality in a problematic field, made up of non-obvious boundaries, a mixture of places and times, and a continuous transition between inside and outside (Amato Mangiameli & Campagnoli, 2020, p. 17).

Today we run after information without arriving at any *knowledge*. We take note of everything without learning about it. We travel everywhere without real *experience*. We communicate continuously without taking part in a *community*. We save enormous amounts of data without making *memories* resonate. We accumulate friends and followers without ever meeting the *Other*. Thus information generates a way of life devoid of stability and duration. (Han, 2022, p. 13)

The ego finds itself, then, in a privileged relationship with self-referential ‘autistic objects’, which lack the dimension of dialogue with the Other and are forced into a constant compulsion to repeat; this reifies personal identity, which is itself objectified because it is deprived of a real relationship with otherness (Han, 2022, pp. 38–39, 91).

This leads to a significant redefinition of the relationship between identity and otherness in the direction of ever-greater abstraction, both in identity and in relationships, both dimensions being characterized by the flexibility of cyberspace (Amato Mangiameli & Campagnoli, 2020, p. 14). ‘If the virtual self is flexible and multiple, if many selves are discovered behind the computer screen, a profound understanding

of identity in real life also passes through the online self (the many selves)' (Amato Mangiameli & Campagnoli, 2020, p. 15). Thus a multiplicity of 'informational identities' emerges, which become increasingly difficult to keep an inventory of (Sisto, 2020, p. 138). On the other hand, the concepts of community and the public sphere also undergo profound changes, effectively described through the suggestive idea of 'social swarms' (Han, 2023), a concept capable of faithfully reporting the fragility of subjective interactions in the parallel and progressive atomization of centres of private power, separated from any connection with traditional procedures of political representation and mainly aimed at maximizing particular objectives and interests. 'Swarms do not need to be weighed down by the tools of survival; they come together, disperse and gather again, from one occasion to another, each time for an invariably different reason, and are attracted by changing and mobile objectives' (Bauman, 2010, p. 96). Swarms do not form teams, are not subject to hierarchies and do not correspond to superior orders; they do not identify a centre or a summit, but coincide with impromptu groupings of interests in support of changing and volatile objectives, ensuring that each component is, at the same time, a specialist which is both an indispensable and a superfluous element in the pursuit of changeable objectives (Bauman, 2010, p. 97).

## 1. Personal identity on the Web

To deal with the critical issues deriving from the weak social ties that are typical of the Web, it does not seem possible to make constructive uses of the interactive peculiarities of the most recent forms of virtual exchange, such as social networks or social media, which are often correctly defined as 'bubble filters' of reality, inflated by individuals understood, first and foremost, as consumers who, in expressing their preferences through 'likes', merely reproduce the essentially private mechanisms of desire and demonstrate the validity of a personal choice which, for this very reason, becomes something to emulate (Bauman, 2017, pp. 24–25). The delineation of personal identity therefore constitutes a task which is not without obstacles and which develops over time (Ferraris, 2022), and because of the coincidence of personal and digital identity, the projection of the individual into the virtual appears reconfigured in a unitary concept of identity that is capable of understanding the contiguity between physical and analogue reality (Floridi, 2017, pp. 67–98): 'Our double – the "avatar" or the nickname of the past – begins to integrate with the biological self in the management of daily life' (Sisto, 2020, p. 42). A condition is therefore outlined in which the subject is included as part of the virtual environment, through processes that make the distinction between offline and online existence indistinguishable and obsolete (Floridi, 2017, pp. 74–80).

Our life is not divided between online experiences and offline experiences, and there is no supremacy, or greater authenticity, of one over the other. Everything is fused: a virtual experience can continue in the physical world, our action in the virtual world can have concrete repercussions in the offline one. And, above all, there is no reason to believe that what happens online is less ‘true’ than what happens offline. We are not human beings who temporarily immerse ourselves in the digital world and then reemerge, shake it all off, and resume our regular lives: the two experiences are constantly and deeply intertwined. (Signorelli, 2020)

In this way, the conception of a culture centred on dislocation and destined to profoundly question the traditional concept of personal identity is gradually affirmed: the lack of distinction between the online and offline dimensions in fact submits identity to a process of dismemberment, of multiplication in various digital identities (Sisto, 2020, p. 52) that make the individual a complex ‘informational organism’, connecting to similar natural and artificial organisms capable of autonomously processing information (Floridi, 2017, p. 106). Identity, lost ‘in the deep layers of neuronal networks to which the human being has no access’ (Han, 2022, p. 11), experiences an original condition of ‘digital transformation’ (Sisto, 2020, p. 56), which on the one hand seems to guarantee the subject freedom of action and a variety of roles, considering the possibility of creating virtual identities, but which, on the other, exposes the individual to pervasive information surveillance and the ‘datafication’ of one’s identity (Longo & Scorza, 2020, pp. 136–137), which is now subjected to algorithmic decision making and predictive processing that is only presumptively neutral and objective but which is not without biases and unknowns in terms of the protection of fundamental human rights (Rejmaniak, 2021).

## **2. Identity and individuals: Evolving concepts and claims**

The expression ‘personal identity’ has, over time, taken on various semantic values; in fact, in its first and oldest meaning, it indicated the complex of personal data that allow a specific subject to be identified, first of all in relation to public authorities. In a second and more recent meaning, personal identity expresses a sort of synthesis of the person’s biography and a social projection of their personality, that is, their socially mediated and objectified image (Miniscalco, 2021, p. 35). In this way, the traditional concept of personal identity expresses the idea according to which each individual has his/her own uniqueness, a coincidence with oneself (Sisto, 2020, p. 52) from which the correspondence of personality and behaviour derives (Faini & Pietropaoli, 2021, p. 105). In other words, it consists of a valid individual representation, understood both in relation to one’s own information and, in a more current direction, in a correct projection of the individual in the context of social life in which

a personality consisting of tastes, experiences and personal beliefs develops (Faini & Pietropaoli, 2021, p. 106). This last position is considered legally relevant by modern legal systems and constitutes a right of personality, which in turn falls within the idea of inviolable rights, particular subjective rights that guarantee all the human and moral qualities of a person and its specific social identity (Miniscalco, 2021, p. 31). From this perspective, identity, definable as the free determination and representation of oneself (Redazione Diritto dell'Informatica, 2020), both as the 'right to be oneself' and control over one's definition in the social context, constitutes a legally protected asset which is characteristic of current democratic systems.

The right to identity, in fact, is not arbitrary, but protects the social projection of personal identity, which therefore requires social mediation between the image that the subject has of himself (personal truth) and the set of data objectives referable to the subject (historical truth), thus protecting the image, socially mediated and objectified, and therefore the identity of the subject. (Faini & Pietropaoli, 2021, p. 106)

The right to personal identity is among the fundamental rights and has been significantly defined by the Italian Constitutional Court as the right to be oneself, 'with the acquisition of ideas and experiences, with ideological, religious, moral and social convictions, which differentiate, and at the same time qualify, the individual'. Identity, continues the Court, represents 'a good in itself, regardless of the personal and social condition or the merits and defects of the subject, so that everyone is recognized as having the right to have their individuality preserved' (Constitutional Court, Sentence no. 13 of 1994).

### **3. The right to digital identity**

The right to digital identity can be considered as a sort of electronic version of the right to personal identity, without thereby causing an undue coincidence of the two expressions, given that online it is possible for a person to take on a plurality of identities as a consequence of the storage on the Web of different types of personal information, or simply as the fruit of the author's imagination (Miniscalco, 2021, p. 35). On the other hand, digital identity is not an autonomous and different right compared to personal identity, but the expression of the latter on the Web, since it protects the subject's interest in being represented online with his/her correct identity and not seeing his/her heritage of ideas and life experiences misrepresented (Miniscalco, 2021, p. 37). In other words, the definition of digital identity must currently be added to the traditional delineation of personal identity, which is necessarily evolving and should be understood as the set of data and information entered into the Web and referable to a specific subject, that is, the set of digital data which allow us to re-

construct a more or less detailed profile of the user, relating to his/her personality or any other element capable of outlining personal identity. For example, following the dictates of the ‘SPID Decree’ of the Italian Presidential Council of Ministers of 24 October 2014 (Gazzetta Ufficiale della Repubblica Italiana, 2014), digital identity is constituted by the ‘computer representation of the one-to-one correspondence between a user and his identifying attributes, verified through the set of data collected and recorded in digital form’. So digital identity can correspond to personal identity or be different from it, mainly thanks to the control established by individuals over their data circulating online; this is connected to the protection of privacy, defined in the sphere of the protection of personal data, but also operating outside of private life, in order to guarantee the individual’s decision making and self-determination and, above all, their power to control the circulation and public availability of data concerning them, and to correct and transparent management of digital data, especially in terms of reputation and image, to the necessary IT security measures (Redazione Diritto dell’Informatica, 2020). It can be noticed how, over time, one or more virtual identities emerge for each individual, which grow through information, often having a life of their own and being disseminated in social networks or digital environments, which make their subsequent deletion or recovery possible (Ziccardi, 2017, p. 216). To this it must be added that this information, without precise space-time limits, is devoid of contextualization and is not qualitatively controlled, and is therefore subject to possible distortions and manipulations, so-called ‘fake news’ (Faini & Pietropaoli, 2021, p. 107). Digital identity definitely tends to break down into multiple individual profiles of Web surfers which are capable of outlining the self understood as an information system, according to which ‘we are our information’ (Floridi, 2017, pp. 77–78). This allows the outlining of an open and evolving notion of digital identity as a disembodied entity, entirely determined by the information that concerns it, ‘the only and “true” projection into the world of each person’s being. Not a virtual “double”, therefore, that sits alongside and accompanies the real person, but the instantaneous representation of an entire life journey, a limitless expansion of social memory that conditions individual memory’ (Rodotà, 2014, p. 42).

This leads to the right to effective information self-determination, that is, the control of one’s own digital information, in order to obtain a complete, correct and updated delineation of identity, as well as an exact social projection of it; these principles are expressed by art. 9 of the Declaration of Internet Rights, made public on 13 October 2015 in the Sala della Regina of Palazzo Montecitorio in Rome, a document which, although lacking binding and prescriptive force, nevertheless performs a significant function of moral suasion, representing a guide in the promotion of digital regulations and in the valorization of a society of dignity, equality and participation (Rodotà, 2005). This Declaration states that every person has the right to integral and updated representation of their identities on the Internet, that the definition of identity concerns the free construction of personality and cannot be excluded from

intervention by and knowledge of the interested party, and consequently, the use of algorithms and probabilistic techniques must pay attention to the interested parties, who, in any case, can oppose the delineation and dissemination of profiles concerning them. Finally, it states that each person has the right to provide only the data that is strictly necessary for the fulfilment of obligations established by law for the supply of goods and services and for access to platforms operating on the Internet, and that the attribution and management of digital identity by public institutions must be accompanied by adequate guarantees, particularly in terms of security.

#### **4. Identity and digital memories: The right to be forgotten**

Memory and forgetting represent fundamental terms in the delineation of individual identity as well as in relation to different cultural contexts, being elements capable of positioning and repositioning individuals and collectivities in unprecedented spaces of individual action and social representation (Fabietti, 2001, p. 407). The most current digital technologies, moreover, delineate contemporaneity as characterized by an unprecedented intensification of contacts between individuals and between individuals and groups, each having its own identity, history and very different worldviews (Fabietti, 2001, p. 407). ‘Memory and forgetting are selective processes through which identity is shaped, and thus are essential components in the configuration of any culture understood as an entity in continuous transformation’ (Fabietti, 2001, pp. 408–409); this makes them indispensable reference points for embracing broad reflections on human life and its social dimensions (Fabietti, 2001, p. 421). In this field, then, the impressive and continuous growth of collection, storage and processing of digital data is located, becoming ‘a relentless collective memory of the Internet, where the accumulation of our every trace makes us prisoners of a past destined never to pass, which challenges the construction of personality free from the weight of every memory, and which imposes a continuous social scrutiny by an infinite array of people who can easily know information about others’ (Rodotà, 2014, p. 41). If one adds to this the aforementioned inability of the Web to make an appropriate selection of sources based on veracity and quality, it is understandable how attempting to trace the main lines of the debate on the right to be forgotten can be useful in a critical reflection on the vulnerability of an individual identity which appears to be immersed and shown in the virtual world, exposure for which one pays an absolutely real price (Faini & Pietropaoli, 2021, p. 61). In fact, ‘today’s world seems stricken by a veritable epidemic of memories that provides the past with an opportunity to emancipate itself from the control of the present. As it becomes autonomous as an objective reality in its own right, the past superimposes itself on the present by interposing itself between one instant and the next’ (Sisto, 2020, p. 14). In other words, it is possible for memories buried in the digital world to face the present by

being brought back to life by most modern digital technologies, gaining the same actuality as the moment in which they were experienced (Sisto, 2020, pp. 20–21).

In the context described, and between the right to protection of personal data and the right to personal identity on the Internet, the right to be forgotten arises, aimed at preventing the re-publication of news that was legitimately made known at the time after a significant period of time has elapsed, such as to make the information of no interest to the community (Miniscalco, 2021, p. 37). The right to be forgotten is expressed, in turn, in two directions: as the right to correct and updated contextualization of online information and as the de-indexing of personal data visible in the list of results offered by a search engine. Both of these protect a person's interest in not remaining 'indeterminately exposed to the further damage that the repeated publication of news that was legitimately published in the past causes to his honour and reputation' (Judgment of the Italian Civil Court of Cassation, 1998). In such circumstances, the scope of the right to be forgotten is determined by past events, usually negative in terms of personal image, that were lawfully made public in the past but that, with time, may be subject to subsequent consultation and dissemination, making such dissemination unlawful (Faini & Pietropaoli, 2021, p. 62). As a result, the right to be forgotten constitutes the right not to be remembered in relation to past news events which are not currently of public interest and which may turn out to be no longer true; this is an aim to ensure that the identity and social image of the person concerned is not misrepresented. In other words, the right to be forgotten is related to the deceptive reproduction of a 'perennial actuality' that denies the dynamic character of individual identity (Zanichelli, 2016, p. 10).

To free oneself from the oppression of memories, from a past that continues to heavily mortgage the present, becomes a goal of freedom. The right to oblivion presents itself as the right to govern one's memory, to restore to each person the possibility of reinventing oneself, of constructing personality and identity by freeing oneself from the tyranny of cages in which a ubiquitous and total memory wants to lock everyone up (Rodotà, 2014, pp. 43–44).

In relation to the possibility that this right poses, it could, on the one hand, clash with the principle of freedom of expression, defined as the right to inform and be informed; on the other hand, it complements the right to privacy and personal identity by resolving itself in the possibility of disassociating one's name from a given search engine result and in seeing the evolution of oneself represented by the elimination of data that is no longer referable to one's current personality (Ziccardi, 2017, p. 222). In this regard, the central issue is therefore represented by the 'persistent accessibility' of data online (Zanichelli, 2016, p. 25; Ziccardi, 2017, p. 211), which is a long way from that found in traditional electronic archiving systems, as it is able to sustain profound changes on the anthropological level and can give rise to pressing questions about the

virtual exposure of subjects who are condemned to a perpetual here and now and to a sort of ‘permanent visibility’ (Rodotà, 2014, p. 42). Therefore oblivion, in the online context, in many respects represents a fiction, or, rather, the hope that a given piece of data will remain under the surface of the Web, that is, will not become fashionable and the object of generalized attention (Ziccardi, 2017, p. 208). ‘The Web does not function like a printed newspaper, yellowing in dusty archives. The problem today is no longer one of “republishing” a news story, but it is the permanence on the Web of a news story that can be “indexed” so as to override more up-to-date news’ (Faini & Pietropaoli, 2021, p. 62). Such critical questions open up enormous problems in an information society fuelled by digital data based on pervasive user surveillance and the incessant reprocessing of information (Rejmaniak, 2021, pp. 25–26; Ziccardi, 2017, p. 215) that rebalances social and individual memories (Zanichelli, 2016, p. 28).

## 5. A look at European legislation and Italian jurisprudence

The issues developed above find an interesting confirmation in the path taken by European legislation and Italian jurisprudence, some basic traits of which are discussed here regarding the recognition of the right to be forgotten by bringing out the main connections with the protection of personal identity. In this regard, if in the famous ruling of the Italian Civil Court of Cassation of 9 April 1998 (sec. III, no. 3679) the right to be forgotten is considered as a current and relevant dimension of the right to personal privacy, in the subsequent Supreme Court ruling (no. 5525 of 2012), a direct reference to the protection of personal identity, established on the principle that outdated news can be equated to untruthful news, can be noted (Faini & Pietropaoli, 2021, p. 65). In fact, it should be emphasized how, in this case, the interested subject does not claim to remain anonymous or to arouse forgetfulness of a fact that has happened; ‘rather he considers that indexing by search engines irreparably deforms the social projection of his own identity’. In this regard, the right to be forgotten does not coincide with a generic right to be forgotten, of arduous fulfilment in the virtual context, given the possibility of making offline copies of the events concerned by republishing them, but rather with the right to be remembered correctly, that is, in the necessary consideration of the temporal developments of the events recalled (Faini & Pietropaoli, 2021, p. 65). The right to be forgotten therefore refers to the need to obtain updated and contextualized news in relation to subsequent developments, leading to the convergence of the right to an accurate representation of one’s identity with the right to control over personal information (Zanichelli, 2016, p. 16). In addition, it should be noted that, in an initial stage, digital publishers were the entities to whom any requests for updating the online archive should be addressed, while search engines were regarded as mere intermediaries of information: in this respect, the sentence of the Court of Milan of 26 April (no. 5820/2013) is framed, for example, as are

the numerous provisions of the Guarantor for the Protection of Personal Data (also known as the Privacy Guarantor) aimed at publishers who are required to give an account, in the margin of individual articles or in notes to them, of the developments of events relating to the subject applicant and prescribing a deadline for modification or integration. It is appropriate to clarify here that the Privacy Guarantor is an independent Italian administrative authority established by the Law of 31 December 1996 (no. 675) to ensure the protection of fundamental rights and freedoms and respect for dignity in the processing of personal data.

The function of search engines, together with the action of digital platforms and social networks, will gradually become more and more central in the digital traceability referable to an individual, as well as in the automatic processes of mass collection of digital data and its interpretation, thanks to search engines which are capable of indexing information according to an order which is sorted by relevance, not chronologically, thereby making it available for subsequent reprocessing without, however, its overcoming or updating being effectively highlighted (Zanichelli, 2016, p. 26). In this context, a first significant problem concerns the possible balancing of the right to be forgotten with rights of equal importance; the former situates itself, as we have seen, at the crossroads between the right to personal privacy, which it, represents a projection or a reflection of, (Faini & Pietropaoli, 2021, p. 63), the right to report news and the right to achieve correct information as the basis of authentic democratic participation. These are therefore instances of protection aimed at the truth and authenticity of one's identity and image that evolve in historical actuality (Zanichelli, 2016, p. 14), instances that are made explicit in the exercise of effective control over personal data and the time of their accessibility (Zanichelli, 2016, p. 27).

## **6. The Google/Spain ruling: A watershed in the right to be forgotten**

In this regard, the famous ruling of the Court of Justice of the European Union on the *Google/Spain* case (C-131/12) of 13 May 2014 can be recalled, which pointed the way to de-indexing that is not intended to remove the disputed news, but rather to make it more difficult to find online, in order to reduce the exposure of the interested party to the events as much as possible but without compromising the competing right to news and information. From the perspective of this judgment, the search engine operator is considered responsible for the processing of personal data, which here coincides with the publication of news on the Web, an activity capable of profoundly affecting the exercise of the fundamental rights to identity, privacy and the protection of personal data (Zanichelli, 2016, p. 17). It derives a position of particular importance from it that refers to the obligation, in the presence of specific conditions, to delete or to put at the bottom of the link list certain links to the list of search results. This activity is indicated by the terms delisting or de-indexing, which do not consist

of eliminating from the Internet all the information referable to a specific person, but of omitting information which is potentially harmful to personal honour and dignity, as well as data no longer current in reference to a specific subject, from the list of results proposed by the search engine.

The importance of the *Google/Spain* pronouncement therefore signals the need to ensure uniform application of European law to the point where the search engine's activity, in addition to that of publishers, significantly affects fundamental rights to identity, privacy and personal data protection (Mensi & Falletta, 2018, pp. 388–398). This clearly does not amount to the recognition of a general and absolute right to the removal of controversial virtual information, but seeks a balancing of the different rights at stake by emphasizing how the rights of the interested party prevail over both the economic interest of the search engine and, in some cases, of the collective interest in information. An example of this is the case considered by the judgment of the European Court of Human Rights dated 19 October 2017, concerning a famous businessman's request for the deletion of online news regarding his involvement in corruption matters and his belief that this news violated respect for privacy and family life; on this point, the European Court of Human Rights agreed with the decision of the German judges who rejected the request, taking into account the influence of the person concerned in the social context and the public interest in knowledge of the affair.

The *Google/Spain* pronouncement not only raises the need for a uniform international guideline for search engines, but also gives rise to some issues concerning the role of search engines and their resulting responsibilities in representing private actors with considerable market power; they are called upon to perform a very delicate balancing act between subjects and their associated interests, with recourse to the national Guarantor for the Protection of Personal Data or the judiciary being only secondary and a later step.

Secondly, from an examination of Google's Guidelines published in November 2014, one can note the provision of a detailed procedure by which the interested party can submit a request for de-indexing; Google previously established the parameters to be considered and specify that, in the event of their failure to accept the request, the interested party may, as seen, appeal to the courts or the Guarantor. It emerges from these Guidelines that the granting of the request is not subject to any adversarial or public measure, and thus appears to be centred in a private, profit-driven perspective that raises a further danger of the indiscriminate granting of de-indexing requests, implemented by the search engine to avoid losing in a possible court case, in a direction contrary to the protection of freedom of information. Secondly, national data protection authorities appear to be vested in concrete ways of implementing the *Google/Spain* judgment, as indicated by the European Commission spokesperson, thus leaving the way open for different and discordant national interpretations, as well as the possibility of the consolidation of more sensitive jurisprudential orienta-

tions on the protection of personal identity, to the detriment of freedom of expression, or vice versa.

The 2014 Guidelines were followed by the Guidelines 5/2019 on the criteria for exercising the right to be forgotten in the case of search engines, pursuant to the GDPR. Without explaining the details of the procedure for requesting de-indexing, this document clearly describes the legal bases, admissible reasons, any exceptions to the possibility of exercising the right to be forgotten and the content of this; the procedure consists, essentially, of deleting one or more links to Web pages from the list of search results, starting from the first name and surname of the interested party, in light of the provisions of art.17 of the GDPR, and clarifies how the content will remain available using other search criteria. From reading the Guidelines, it is also clear that requests for de-indexing do not entail the complete deletion of personal data. In fact, personal data will not be deleted either from the website of origin or from the index and cache of the search engine provider; for example, an interested party can request the removal of personal data found in the media, such as in a newspaper article, from the index of a search engine. In this case, the link to the personal data may be removed from the search engine index, but the article in question will still remain under the control of its original publisher and may remain publicly available and accessible, despite being no longer visible in results based on queries which in principle include the name of the interested party.

As can be seen, for a first complete definition of the right to be forgotten in the legislative field, it is necessary to wait until European Regulation 2016/679; it should be remembered here that the provisions contained in the Regulation have a direct and immediate effect in States of the European Union, without the need for further implementation measures. Despite this, on a national level, it has been necessary to adapt the regulatory acts that already were concerned with the matter of privacy to the provisions contained in the Regulation; in Italy, this meant in particular the Privacy Code (Legislative Decree no. 196/2003). In particular, art. 17 of the GDPR enshrines the right of the data subject to obtain the deletion or modification of his/her personal data, and the data controller has the obligation to delete such data without undue delay if one of the conditions indicated in the first paragraph of the provision occurs, although the Regulation makes no mention of search engines (Faini & Pietropaoli, 2021, p. 71). In art. 17, the right to be forgotten is represented both as a means of reaction to the illicit or incorrect processing of personal data and as an expression of the power of self-determination of information, as an individual manifestation of a free and conscious choice in which the external representation of one's personality is relevant; this can also be present in lawful and correct data processing. The same provision details the specific hypotheses in which the right to be forgotten cannot be exercised and the reasons that require the cancellation or at least the obscuring of personal data which is not necessary for the purposes for which it was collected, the revocation of the interested party's consent, opposition to processing without there

being any prevailing reason to proceed, the assessment, exercise or defence of a right in court, the processing of data for direct marketing purposes or the deletion of data in fulfilment of an obligation established by European or national legislation.

## 7. The right to be forgotten in Italian jurisprudence

In a direction similar to that indicated by GDPR is the judgment of the Court of Milan (Civil Sect. I, no. 10374/2016), which, following the Constitution as well as the prevailing European orientation in the field, affirms the centrality of personal identity, reflected in the right to be forgotten: 'rather than an autonomous right of personality, *sub specie* of the right to be forgotten, it constitutes an aspect of the right to personal identity, namely the right to disassociate one's name from a given search result'. The right to be forgotten therefore intertwines with the identity claim to obtain a correct representation of oneself, which results in the guarantee offered by the legal system of reconfiguring one's telematic image. More recently, the Court of Cassation, in Judgment no. 9147/2020, reiterated, in line with the CJEU's 2014 decision, the principle according to which the de-indexing of news by a search engine allows the right to privacy and deletion of data to be reconciled with that of reporting, without forcing a media outlet to delete parts of its computerized archives. The ruling in question also expresses the distance and, at the same time, the relationship between the right to be forgotten and the right to privacy, since it is not a question of preventing the disclosure of confidential data and information, but of preventing such data and news, even if legitimately published, remaining available to the community *sine die*, causing potential damage to the reputation of the interested party due to reference to past events; the right to be forgotten must in any case have precedence where news relating to facts taking place in the past no longer provides a suitable representation of the interested party. Despite the rights granted to the interested party by art. 17 of the GDPR, the Court underlined how the same EU provision determines the exclusion of protection where the right to be forgotten must be balanced with the processing of data due to the exercise of the right to freedom of expression and information; archiving in the public interest represents a particular case, as it is instrumental to historical research and the expression of the right to freedom of art and science and their teaching pursuant to art. 33 of the Italian Constitution, as an expression of freedom of thought pursuant to art. 21 of the Constitution. Therefore, in this case, the right to be forgotten may materialize not as a request to delete news from the archive, but rather as a claim to limit generalized and unclear access to news given to Internet users, following the digitization of the name of the interested party in the search engine query, to refer to the solution of delisting.

The very recent ruling of the Court of Cassation (no. 3013/2024) relating art. 17 of the GDPR to art. 21 of the Italian Constitution is also extremely significant and

interesting, as it establishes the prevalence of the right to information over anonymity if the distribution of the image or news provides a contribution to a debate of public interest, if there is an actual and current interest in dissemination of the news or images, or if the interested party has a certain degree of notoriety due to the particular position they hold in the public life of the state. The ruling also offers precise criteria on the methods of sharing information, which must be truthful, must not exceed the informative purpose, must be in the public interest and free from insinuations and personal considerations.

## Conclusions

As seen, the permanence of data on the Internet has made it necessary to better protect the individual and their digital identity; in this context, the right to be forgotten and the right to personal identity tend to combine, because the re-emergence of events from the past that are referable to a person must take place with regard to the identity of the individual, who is often damaged by the spreading of untruthful or misleading information that contributes to the creation of an identity which does not correspond to current reality. From this perspective, the right to be forgotten presents multiple facets that converge in an exact and updated representation of individual identity, placing itself in a strategic position between the right to protection of personal data and to identity, real and digital; this is in a delicate balance with the right to information and constitutes an indispensable prerequisite for an authentic life, that is, capable of reflecting the uniqueness of each person in the moments of their life. The relevance of the right to be forgotten, as an identity claim, is demonstrated by the most recent development of Italian legislation in a different field. In this regard, it is worth remembering the Cartabia Law, which reformed some rules on the administration of justice and regulated the right to be forgotten for defendants and people subject to investigation by introducing art. 64-ter of the Code of Criminal Procedure, according to which search engines have to dissociate the names of those acquitted from news circulating online that refers to investigations in which they were found innocent, avoiding an embarrassing identification with a negative image that is now out of date (Gazzetta Ufficiale della Repubblica Italiana, 2022).

Furthermore, in the sensitive field of oncology, Bill no. 2548/2022 has been presented in Italy by a group of associations that particularly support individuals with genetic mutations often linked to an increased risk of developing certain types of cancer; this proposal was accepted and formalized with the Law of 7 December 2023 (no. 193), which contains new provisions for the prevention of post-recovery discrimination, supporting interested parties with the right not to give information or undergo investigations regarding their previous pathological condition. The new law will enshrine the right to oncological anonymity, after a reasonable period of time

has passed since treatment, preventing any possible discrimination against those who have ‘beaten’ cancer. In particular, the period has been identified as ten years from the end of active treatment, with no episodes of recurrence, for adults and five years for cancers that arose before the age of 21. This right applies, in the cases stipulated in the law, not only to financial and insurance services, but also to the world of work and that of adoptions and child custody. The right to be forgotten therefore offers the possibility not to be identified with the disease for those who have overcome oncological illness, helping them psychologically as well as legally. From these brief considerations, which deserve an independent discussion, the crucial importance of extending the legal protection offered by the right to be forgotten stands out, taking into account the critical issues raised by the most recent information technologies, in order to outline an evolving and comprehensive right capable of protecting the originality of the individual and his/her representation and relationships.

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## Between ‘Quo Vadis?’ and ‘Unde Venis?’ Identity and the Legal Order for Young Poles Living in Ireland

**Abstract:** The aim of the research presented here was to diagnose the personal and social identity of young Poles living in Ireland and attending Polish schools, and to analyse the relationship of this identity with selected elements of the legal order. The main research problems were formulated in the form of questions: (1) What characterises the personal identity of the adolescents surveyed? (2) What is the social identity of the respondents? (3) What is the relationship of the respondents' personal and social identity to selected elements of the legal order? A diagnostic survey method, a survey technique and a research tool in the form of a survey questionnaire were used to realise the aim of the research and to answer the questions posed. The research was conducted among young Poles living in Ireland and attending Polish weekend schools ( $n=104$ ). The analysis of the survey results shows that the identity of Polish young people is multifaceted and combines a strong sense of Polishness with living in Ireland. Key elements of identity include a sense of belonging to the Polish nation, their families and the larger European community, while recognising themselves as Irish residents. Furthermore, identity traits are shaped by place of birth, educational context and key elements of the legal order, such as adherence to the law and respect for human rights, highlighting their willingness to engage in socio-political life.

**Keywords:** education, family, identity, legal order, security

## Introduction

We are interested in two issues, taken together: the identity of young Poles in Ireland and the legal order. At the outset, let us note that, according to the Migrant Integration Policy Index (MIPEX), Ireland ranks in the top ten countries with the highest scores on integration law and practice.<sup>1</sup> Approaching an understanding of how the legal order is intertwined with the formation of young people's identities is key to analysing the integration and adaptation of Polish migrants, and potential conflicts and synergies between them and Irish society. Research on identity has implications for the legal order and allows a better understanding of contemporary migration, just as discussions of the effects of migration on the legal order shed new light on questions of identity. The phenomenon of 'liquid modernity' observed in the world (Bauman, 2000) is gaining in complexity and is becoming an increasing challenge for researchers and legislators. It also poses a challenge for host societies of migrants and for migrants themselves, who encounter a 'legal order' not always previously known to them. Meanwhile, the legal and political arrangements of the host country are a key factor in favouring or hindering migrant activity in various spheres of social life. We should add that research on Poles in Ireland has resulted in a number of valuable studies which concern a range of issues, both general and specific. Particularly outstanding in recent years are those concerning not only the history and dynamics of the phenomenon (Kloc-Nowak, 2023a), but also integration policies in Ireland (Lesińska, 2023a), labour issues (Cawley, 2022), the functioning of Polish NGOs (Płachocki et al., 2023; Pszczółkowska, 2023a), Polish education in Ireland (Kloc-Nowak, 2023b), childcare among Polish working mothers (Bojarczuk, 2023), political participation of Poles in Ireland (Lesińska, 2023b; Pszczółkowska, 2023b; Fanning et al., 2021; O'Boyle et al., 2016) and the projected future of Poles in Ireland (Pszczółkowska, 2023a).

Young Poles who emigrated with their parents to Ireland as children or who were born into Polish families, regardless of their parents' temporary or permanent plans, face the challenge of adaptation and integration. These young people are put in the position of experiencing a variety of identity pressures because the language and culture in their homes is different from what they experience in, for example, an Irish school. Their identity is shaped in a continuous process of negotiation, not only between past and present, but also between Polishness and Irishness, influenced by the cultural, social and legal pressures of both countries. Such identity pressures affect their perception of the applicable law in the society in which they live. This demographic group, discovering and shaping its identity in a unique Irish and Polish con-

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<sup>1</sup> MIPEX is an indicator of the quality of integration policies in dozens of countries around the world; <https://mipex.eu/>.

text, is creating a new identity mosaic that is both Polish and Irish, which requires careful analysis.

As the identity of young Poles in Ireland is shaped at the intersection of both cultures, which permeates their personal experiences, and in the context of two languages and legal and social traditions, an analysis of this identity must take into account the dynamics between the preservation of Polishness and the process of adaptation to the Irish socio-legal order. At the intersection of these worlds, unique patterns of identification emerge in response to the challenges of living in the diaspora. For a young generation balancing two identities, the question of belonging to a society, the depth of that belonging and the impact on that society becomes crucial. The legal order in Ireland provides a framework within which the identity of young Poles is not only lived, but also constructed and manifested. Law, as one of the basic determinants of social interaction, influences the formation of personal and group identity. From how to obtain citizenship, to employment rights, to issues of education and social participation, all these elements of Irish law are reflected in the individual and collective sense of identity of young Poles.

## 1. Methodology

The aim of the research was to diagnose the personal and social identity of young Poles living in Ireland and attending Polish schools, and its relationship with selected elements of the legal order. The main problems of the empirical research were encompassed by three questions: (1) What characterises the personal identity of the adolescents surveyed? (2) What is the social identity of the respondents? (3) What is the relationship of the respondents' personal and social identity to selected elements of the legal order? The research problems were mainly related to description and diagnosis, and were not related to verification studies, hence the formulation of research hypotheses was abandoned. This allowed the research hypotheses to avoid affecting the final outcome of the research (Nowak, 2012).

A diagnostic survey method and a questionnaire technique were used to achieve the above objective and thus to answer the research problems (Łobocki, 2006). The research tool used was an original survey questionnaire designed for young Poles living in Ireland and attending Polish weekend schools.<sup>2</sup>

Two independent variables were used in the research, namely the respondents' place of birth (indices: Poland and Ireland) and the education of the respondents' parents (indices: higher and lower, where lower meant secondary or vocational). Three dependent variables were also used, such as respondents' personal identity

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2 Krzysztof Koseła's (2003) personal identity indicators were used in the construction of the research tool.

traits, their sense of belonging to ‘we’ groups and their opinions on selected elements of the legal order.

The research was conducted in November 2022 among Polish young people attending Polish weekend schools in Ireland; the research team intended to survey all seventy Polish weekend schools in Ireland.<sup>3</sup> The selection of the young people surveyed was purposive. The following group selection criteria were adopted: Polish origin, participation in a Polish weekend school, age (13–15 years old). The criteria for selecting respondents in this way were intended to select a group that was highly representative of the Polish youth population in Ireland and of an age that would enable the content of the survey questionnaire to be interpreted correctly.

The population of students aged 13–15 in Polish weekend schools in Ireland at the time of the empirical study was n=800.<sup>4</sup> For the surveys to be representative, the minimum sample size should be nb=343 people. In the end, 104 people took part, from thirteen of the seventy schools that were invited to participate. The research results obtained are therefore of a pilot nature and represent a preliminary diagnosis of the trends under investigation.

A non-parametric chi-square test ( $\chi^2$ ) was used to analyse the results, which made it possible to check whether there were relationships between the variables. In the statistical analysis, the correlation condition was assumed to be  $p<0.05$ . When indicating percentages, it was assumed that a strong indication was present for responses of 70%–100%, moderate for 41%–69% and low for 0–40%.

## 2. Research results

### 2.1. The personal identity of Polish adolescents in Ireland

The issue of personal identity is addressed in the Irish document ‘Migrant integration strategy: A blueprint for the future’ developed by the Department of Justice and Equality. In defining integration, one can speak of one’s ‘own [...] identity’: integration is defined in current Irish policy as the ‘ability to participate to the extent that a person needs and wishes in all of the major components of society without having to relinquish his or her own cultural identity’ (Department of Justice and Equality, 2017, p. 11). The same document also states that ‘[m]igrants are enabled to

3 The research team consisted of Dr hab. Ilona Urych (Associate Professor, War Studies University), Dr hab. Cezary Smuniewski (Associate Professor, University of Warsaw), Dr hab. Karolina Kochańczyk-Bonińska (Interdisciplinary Research Centre of the University of Warsaw ‘Identity – Dialogue – Security’) and Dr Jarosław Płachecki (Old Polish University of Applied Sciences in Kielce). The research was supported by Ognisko Polskie CLG, based in Dublin, as part of the project ‘Polish children and adolescents in Ireland – experiences and life projects’.

4 The data comes from Dr Jarosław Płachecki – Director of the Dublin Branch of the Old Polish University of Applied Sciences in Kielce.

celebrate their national, ethnic, cultural and religious identities, subject to the law' (p. 10) and that 'Ireland's integration policy is intercultural in nature, seeking to promote the engagement of migrants, to address their specific needs and to ensure respect for their distinct identities' (p. 12). The issue of personal identity is a sensitive matter, as evidenced by the transcript from the document 'Migrant integration strategy 2017–2020: Progress report to Government Office for the Promotion of Migrant Integration', which was presented by the Minister of State at the Department of Justice and Equality. Among other things, the text presents anti-bullying procedures for all primary and post-primary schools:

The procedures include a number of specific measures in respect of identity-based bullying including a requirement on all schools to have in place education and prevention strategies that explicitly deal with identity-based bullying. The education and prevention strategies that the school will implement must be documented in the anti-bullying policy and must explicitly deal with the issue of identity-based bullying. (Government of Ireland, 2019, p. 45)

The above data in the Irish documents do not say precisely what personal identity is, but support the statement that it is related to a set of personal traits referring to concepts such as ethnicity, nationality, culture and religion. Therefore, during the research, we asked young Poles living in Ireland which of the indicated traits they would use to characterise themselves. In other words, the young people were asked to complete a sentence by ticking the answers of their choice: 'An important trait of mine is that I am...'. Thus the analysis of the research results allowed for a diagnosis of the personal social identity of Polish youth in Ireland (cf. Table 1). The research shows that 89.4% of the young people surveyed feel Polish, 76.9% feel that they are a member of a family, 68.3% feel that they are European and 62.5% feel that they care about others. Thus it can be shown that the main identity indicators of the respondents are related to social identity, including Polish national identity, while about half of the respondents have a sense of Irish social identity: 52.9% feel they are residents of a region, city or town, and 48.1% feel they are Irish citizens.

Table 1. Personal identity of respondents\*

PERSONAL IDENTITY TRAIT (I AM...)	n	%
Polish	93	89.4%
a family member	80	76.9%
a person who cares about other people	65	62.5%
European	71	68.3%
Irish	38	36.5%

the master of my own destiny	18	17.3%
a person with a future	28	26.9%
a citizen of Poland	23	22.1%
a citizen of Ireland	50	48.1%
a resident of a region, city, locality	55	52.9%
a representative of a national minority in Ireland	26	25.0%
a person attached to Polish traditions	33	31.7%
a person attached to Polish national values	27	26.0%
a supporter of democracy	18	17.3%
a person of modest means	17	16.3%
a person attached to Catholic values	22	21.2%
a person attached to non-Catholic religious values	10	9.6%
a person cooperating with the Polish community	18	17.3%
a believer	28	26.9%
a person associated with the Catholic Church	32	30.8%
a person associated with a Catholic weekend school	10	9.6%
a person critical of the Church	8	7.7%
a non-believer	11	10.6%
a citizen of a country important in the world	35	33.7%
an advocate of equality and social justice	41	39.4%
an individualist	46	44.2%

\* multiple choice

Source: own study.

Based on the survey results, the personal identity traits of the respondents were determined according to their place of birth (cf. Table 2). Responses indicate that those born in Ireland are more likely than those born in Poland to have a sense of being Irish, the master of their own destiny, a person with a future, a citizen of Poland, a citizen of Ireland, a representative of a national minority in Ireland, a person attached to Polish traditions, a person cooperating with the Polish community, a believer, a person associated with the Catholic Church, a person associated with a Catholic weekend school and a supporter of equality and social justice.

Table 2. Personal identity traits of respondents according to their place of birth<sup>5</sup>

PERSONAL IDENTITY TRAIT (I AM...)	Poland (n=30)		Ireland (n=74)		p
	n	%	n	%	
Polish	25	83.3%	68	91.9%	0.198
a family member	24	80.0%	56	75.7%	0.635
a person who cares about other people	20	66.7%	45	60.8%	0.576
European	20	66.7%	51	68.9%	0.823
Irish	5	16.7%	33	44.6%	0.007
the master of my own destiny	1	3.3%	17	23.0%	0.016
a person with a future	3	10.0%	25	33.8%	0.013
a citizen of Poland	3	10.0%	20	27.0%	0.044
a citizen of Ireland	10	33.3%	40	54.1%	0.049
a resident of a region, city, locality	17	56.7%	38	51.4%	0.622
a representative of a national minority in Ireland	2	6.7%	24	32.4%	0.006
a person attached to Polish traditions	3	10.0%	30	40.5%	0.002
a person attached to Polish national values	5	16.7%	22	29.7%	0.138
a supporter of democracy	3	10.0%	15	20.3%	0.209
a person of modest means	4	13.3%	13	17.6%	0.597
a person attached to Catholic values	3	10.0%	19	25.7%	0.076
a person attached to non-Catholic religious values	1	3.3%	9	12.2%	0.166
a person cooperating with the Polish community	1	3.3%	17	23.0%	0.016
a believer	4	13.3%	24	32.4%	0.047
a person associated with the Catholic Church	2	6.7%	30	40.5%	0.001
a person associated with a Catholic weekend school	0	0.0%	10	13.5%	0.034
a person critical of the Church	2	6.7%	6	8.1%	0.802
a non-believer	2	6.7%	9	12.2%	0.409
a citizen of a country important in the world	8	26.7%	27	36.5%	0.337
an advocate of equality and social justice	18	60.0%	23	31.1%	0.006
an individualist	13	43.3%	33	44.6%	0.907

Source: own study.

5 Green colour in tables indicates statistically significant results.

The analysis of the survey results made it possible to diagnose important personal identity traits of the respondents depending on their parents' education (cf. Table 3). Respondents indicated that the feeling of being the master of own destiny, a person of modest means and a person who is attached to Polish traditions is more common among those whose parents have a higher education.

Table 3. Personal identity traits of respondents in relation to parental education

PERSONAL IDENTITY TRAIT (I AM...)	Higher education (n=50)		Lower education (n=54)		p
	n	%	n	%	
Polish	43	86.0%	50	92.6%	0.274
a family member	35	70.0%	45	83.3%	0.107
a person who cares about other people	31	62.0%	34	63.0%	0.919
European	30	60.0%	41	75.9%	0.081
Irish	18	36.0%	20	37.0%	0.912
the master of my own destiny	14	28.0%	4	7.4%	0.006
a person with a future	17	34.0%	11	20.4%	0.117
a citizen of Poland	13	26.0%	10	18.5%	0.358
a citizen of Ireland	22	44.0%	28	51.9%	0.423
a resident of a region, city, locality	27	54.0%	28	51.9%	0.826
a representative of a national minority in Ireland	14	28.0%	12	22.2%	0.496
a person attached to Polish traditions	20	40.0%	13	24.1%	0.081
a person attached to Polish national values	15	30.0%	12	22.2%	0.817
a supporter of democracy	11	22.0%	7	13.0%	0.223
a person of modest means	12	24.0%	5	9.3%	0.042
a person attached to Catholic values	15	30.0%	7	13.0%	0.034
a person attached to non-Catholic religious values	6	12.0%	4	7.4%	0.427
a person cooperating with the Polish community	9	18.0%	9	16.7%	0.857
a believer	17	34.0%	11	20.4%	0.117
a person associated with the Catholic Church	16	32.0%	16	29.6%	0.793
a person associated with a Catholic weekend school	6	12.0%	4	7.4%	0.427
a person critical of the Church	5	10.0%	3	5.6%	0.395

a non-believer	5	10.0%	6	11.1%	0.834
a citizen of a country important in the world	17	34.0%	18	33.3%	0.942
an advocate of equality and social justice	22	44.0%	19	35.2%	0.358
an individualist	21	42.0%	25	46.3%	0.659

Source: own study.

## 2.2. The social identity of respondents

We meet different people in life. With some we quickly have something to talk about and we understand them easily; others are strangers, even though they might live next to us (Arango & Burgos, 2023). Therefore, different groups of people were mentioned in the survey questionnaire, and the young people surveyed were asked how often they felt that they were close to them, that they could describe them as 'we'. Thus, the analysis of the research results made it possible to determine awareness of the social identity of Polish youth in Ireland (cf. Table 4).

Table 4. Social identity of respondents – the 'we' group of respondents\*

SOCIAL IDENTITY (MY 'WE' GROUP)	n	%
my family	98	94.2%
friends from an Irish school	80	76.9%
friends from a Polish school	63	60.6%
Poles in Ireland	59	56.7%
the Polish nation	55	52.9%
the Irish nation	52	50.0%
teachers from an Irish school	40	38.5%
teachers from a Polish school	35	33.7%
neighbours	28	26.9%
the community of the People of God/Catholics	25	24.0%

\* multiple choice

Source: own study.

The analysis of the survey results shows that respondents identify most strongly with their family (94.2%), friends from their Irish school (76.9%) and friends from their Polish school (60.6%). The social identity of Polish youth defined as Poles in Ireland is characteristic of more than half of respondents (56.7%). A similar situation applies to identification with the Polish nation (52.9%) and with the Irish nation (50.0%).

(50.0%). Young people are least likely to identify with the community of the People of God/Catholics (24.0%), neighbours (26.9%), teachers from a Polish school (33.7%) and teachers from an Irish school (38.5%).

The research also identified the social identity of the respondents – their ‘we’ group – according to their place of birth (cf. Table 5). Young people surveyed who were born in Ireland are significantly more likely to identify with teachers from an Irish school and with the Irish, but also with friends from a Polish school and with the Polish nation.

Table 5. Social identity of the surveyed adolescents  
– ‘we’ group according to place of birth

SOCIAL IDENTITY (MY ‘WE’ GROUP)	Poland (n=30)		Ireland (n=74)		p
	n	%	n	%	
my family	28	93.3%	70	94.6%	0.803
neighbours	5	16.7%	23	31.1%	0.133
friends from an Irish school	18	60.0%	62	83.8%	0.009
teachers from an Irish school	7	23.3%	33	44.6%	0.043
friends from a Polish school	12	40.0%	51	68.9%	0.006
teachers from a Polish school	8	26.7%	27	36.5%	0.337
the community of the People of God/Catholics	4	13.3%	21	28.4%	0.104
Poles in Ireland	14	46.7%	45	60.8%	0.187
the Polish nation	10	33.3%	45	60.8%	0.011
the Irish nation	10	33.3%	42	56.8%	0.030

Source: own study.

The research also found that the sense of social identity – the ‘we’ group – does not depend on parental education (cf. Table 6).

Table 6. Social identity of the surveyed adolescents  
– ‘we’ group according to parental education

SOCIAL IDENTITY (MY ‘WE’ GROUP)	Higher education (n=50)		Lower education (n=54)		p
	n	%	n	%	
my family	48	96.0%	50	92.6%	0.457
neighbours	16	32.0%	12	22.2%	0.261

friends from an Irish school	36	72.0%	44	81.5%	0.252
teachers from an Irish school	19	38.0%	21	38.9%	0.926
friends from a Polish school	30	60.0%	33	61.1%	0.908
teachers from a Polish school	19	38.0%	16	29.6%	0.367
the community of the People of God/Catholics	14	28.0%	11	20.4%	0.363
Poles in Ireland	28	56.0%	31	57.4%	0.885
the Polish nation	25	50.0%	30	55.6%	0.571
the Irish nation	21	42.0%	31	57.4%	0.116

Source: own study.

### 2.3. The identity of respondents and the legal order

On the basis of the surveys carried out, it is possible to indicate the respondents' opinions on selected elements of the legal order (cf. Table 7). According to young Poles living in Ireland, it is important (sum of 'fully agree' and 'rather agree' statements equal to or greater than 70%) to comply with the law (94.2%), not violate human rights (89.4%) and participate in human rights activities around the world (81.7%). A smaller proportion of respondents think it is important to take part in general elections (62.5%) and to participate in peaceful protest against a law that is considered unjust (59.6%).

Table 7. Selected elements of the legal order as perceived by respondents

STATEMENTS	n	ANSWER CATEGORY				
		fully agree	rather agree	I don't know	rather disagree	fully disagree
It is important to comply with the law	n	64	34	4	1	1
	%	61.5	32.7	3.8	1.0	1.0
It is important not to violate human rights	n	76	17	8	1	2
	%	73.1	16.3	7.7	1.0	1.9
It is important to participate in human rights activities around the world	n	48	37	15	1	3
	%	46.1	35.6	14.4	1.0	2.9
It is important to take part in general elections	n	26	39	33	4	2
	%	25.0	37.5	31.7	3.9	1.9
It is important to participate in peaceful protest against laws that are considered unjust	n	33	29	33	5	4
	%	31.7	27.9	31.7	4.8	3.9

Source: own study.

The research also demonstrated that respondents' opinions on selected elements of the legal order do not depend on their sense of personal identity (cf. Table 8).

Table 8. Correlation of selected elements of the legal order and the personal identity traits of respondents

PERSONAL IDENTITY TRAIT (I AM...)	ELEMENTS OF THE LEGAL ORDER				
	It is important to comply with the law	It is important to participate in human rights activities around the world	It is important not to violate human rights	It is important to take part in general elections	It is important to participate in peaceful protest against laws that are considered unjust
Polish	0.0362	0.0785	0.0508	0.0602	0.0198
	p=0.715	p=0.428	p=0.609	p=0.544	p=0.842
a family member	0.0099	0.0019	0.0509	0.0456	0.0446
	p=0.920	p=0.985	p=0.608	p=0.646	p=0.653
a person who cares about other people	0.1230	0.0375	0.0360	0.0403	0.0888
	p=0.214	p=0.705	p=0.717	p=0.685	p=0.370
European	0.0160	0.0450	0.0988	0.1937	0.0969
	p=0.872	p=0.650	p=0.318	p=0.049	p=0.328
Irish	0.0875	0.0207	0.0501	0.1368	0.0195
	p=0.377	p=0.835	p=0.614	p=0.166	p=0.844
the master of my own destiny	0.0533	0.0053	0.0496	0.0651	0.0046
	p=0.591	p=0.958	p=0.617	p=0.512	p=0.963
a person with a future	0.0059	0.1421	0.1530	0.0551	0.0801
	p=0.953	p=0.150	p=0.121	p=0.579	p=0.419
a citizen of Poland	0.0602	0.1533	0.1323	0.0591	0.0625
	p=0.544	p=0.120	p=0.181	p=0.551	p=0.529
a citizen of Ireland	0.0697	0.1334	0.0733	0.1438	0.0801
	p=0.482	p=0.177	p=0.460	p=0.145	p=0.419
a resident of a region, city, locality	0.0024	0.0132	0.0295	0.0022	0.0248
	p=0.981	p=0.894	p=0.766	p=0.982	p=0.803
a representative of a national minority in Ireland	0.0550	0.0359	0.0268	0.0180	0.0105
	p=0.579	p=0.717	p=0.787	p=0.856	p=0.916

a person attached to Polish traditions	0.1302 p=0.188	0.0004 p=0.997	0.0010 p=0.992	0.0746 p=0.452	0.0587 p=0.554
a person attached to Polish national values	0.0845 p=0.394	0.1251 p=0.206	0.1965 p=0.046	0.0345 p=0.728	0.0973 p=0.326
a supporter of democracy	0.0892 p=0.368	0.1150 p=0.245	0.1109 p=0.262	0.0101 p=0.919	0.0046 p=0.963
a person of modest means	0.1108 p=0.263	0.1235 p=0.211	0.1943 p=0.048	0.0403 p=0.684	0.0099 p=0.921
a person attached to Catholic values	0.0122 p=0.902	0.1104 p=0.265	0.1793 p=0.069	0.0622 p=0.530	0.1475 p=0.135
a person attached to non-Catholic religious values	0.0173 p=0.862	0.0327 p=0.742	0.1109 p=0.262	0.0725 p=0.465	0.0433 p=0.663
a person cooperating with the Polish community	0.0673 p=0.497	0.0954 p=0.336	0.1791 p=0.069	0.0081 p=0.935	0.0597 p=0.547
a believer	0.0862 p=0.384	0.0398 p=0.689	0.0135 p=0.891	0.0121 p=0.903	0.0241 p=0.808
a person associated with the Catholic Church	0.0328 p=0.741	0.0663 p=0.504	0.0878 p=0.375	0.0713 p=0.472	0.0342 p=0.730
a person associated with a Catholic weekend school	0.0393 p=0.692	0.0898 p=0.364	0.1039 p=0.294	0.0240 p=0.809	0.0784 p=0.429
a person critical of the Church	0.0523 p=0.598	0.1239 p=0.210	0.0247 p=0.804	0.0075 p=0.940	0.0787 p=0.427
a non-believer	0.0429 p=0.665	0.0350 p=0.724	0.0690 p=0.487	0.1557 p=0.115	0.1264 p=0.201
a citizen of a country important in the world	0.0088 p=0.929	0.0919 p=0.354	0.1745 p=0.077	0.1763 p=0.073	0.2347 p=0.016
an advocate of equality and social justice	0.0090 p=0.928	0.0265 p=0.789	0.0360 p=0.717	0.0270 p=0.786	0.0498 p=0.616
an individualist	0.0362 p=0.715	0.0785 p=0.428	0.0508 p=0.609	0.0602 p=0.544	0.0198 p=0.842

Source: own study.

On the basis of the research conducted, it can also be indicated that the respondents' opinions on selected elements of the legal order depend on their sense of social identity (cf. Table 9).

Table 9. Correlation of selected elements of the legal order  
and the social identity of respondents

ELEMENTS OF THE LEGAL ORDER	SOCIAL IDENTITY (MY 'WE' GROUP)									
	my family	neighbours	friends from an Irish school	teachers from an Irish school	friends from a Polish school	teachers from a Polish school	the community of the People of God/Catholics	Poles in Ireland	the Polish nation	the Irish nation
It is important to comply with the law	0.1066	0.0248	0.0224	0.1442	0.0924	0.0147	0.0567	0.0330	0.0794	0.0136
	p=0.281	p=0.803	p=0.822	p=0.144	p=0.351	p=0.882	p=0.568	p=0.739	p=0.423	p=0.891
It is important to participate in human rights activities around the world	0.0565	0.0252	0.0474	0.1591	0.1131	0.0308	0.1387	0.0519	0.0284	0.0830
	p=0.569	p=0.800	p=0.633	p=0.107	p=0.253	p=0.756	p=0.160	p=0.601	p=0.775	p=0.402
It is important not to violate human rights	0.0728	0.0040	0.1610	0.2642	0.1270	0.1030	0.0387	0.0694	0.0295	0.0232
	p=0.463	p=0.968	p=0.102	p=0.007	p=0.199	p=0.298	p=0.697	p=0.484	p=0.766	p=0.815
It is important to take part in general elections	0.0352	0.1724	0.0209	0.1053	0.1337	0.1116	0.1960	0.0438	0.1065	0.0104
	p=0.723	p=0.080	p=0.833	p=0.287	p=0.176	p=0.259	p=0.046	p=0.659	p=0.282	p=0.916
It is important to participate in peaceful protest against laws that are considered unjust	0.0493	0.0628	0.1058	0.0844	0.0310	0.1227	0.1332	0.0088	0.1203	0.1629
	p=0.619	p=0.527	p=0.285	p=0.394	p=0.755	p=0.215	p=0.178	p=0.929	p=0.224	p=0.098

Source: own study.

The analysis of the survey results shows that for young Poles living in Ireland who have a sense of belonging with teachers from an Irish school, it is important not to violate human rights. In contrast, for those respondents who have a sense of be-

longing to the community of the People of God/Catholics, it is important to participate in general elections.

### 3. Directions for future research

The research conducted among young Poles living in Ireland enables the formulation of at least two significant research postulates that should be considered in future analyses. The first concerns a set of questions which, in our assessment, are crucial for subsequent studies on the legal order in this group. It is worth noting that the following set of questions was not included in the research conducted for time reasons, as they emerged only during the analyses of the research material collected from the questionnaires. These issues include:

- What are the main differences in the perception of the legal order between young Poles born in Ireland and those born in Poland?
- How does the educational level of parents influence young Poles' attitudes towards law and social justice?
- What factors shape the attitudes of young Poles in Ireland towards participation in political life, such as voting or protesting?
- Does religious identity influence the views of young Poles in Ireland on law and legal order, and if so, how?
- What are the relationships between national identity and attitudes towards human rights and activities for its protection among young Poles in Ireland?
- How do young Poles in Ireland perceive their role and influence in shaping the legal order of the community they live in?
- How do experiences associated with living in a multicultural environment affect young Poles' understanding of and compliance with the law in Ireland?
- What are the main challenges and barriers in the legal and social integration of young Poles into Irish society?

The second postulate relates to two research perspectives that we deem important in future scholarly pursuits. The research among young Poles residing in Ireland has highlighted the necessity to better understand the relationships between identity and legal order among Poles living in various countries. The knowledge gained can be useful not only in studies of legal anthropology and the influence of the Polish diaspora and Poles living outside Poland on the Polish legal order but also in other scholarly areas. Understanding the relationship between identity and attitudes towards the legal order of young Poles living worldwide is crucial for analysing their individual experiences, as well as for discussions of migration, integration, social and cultural policy, and international law.

The first research perspective, the legal-political, should focus on identity as a complex social construct formed by the interaction between the individual and the

social environment. In the context of migration, identity is shaped by factors such as the culture, value systems and legal norms of the country of residence. Studying this dynamic will help understand how young Poles adapt to different legal systems and how these systems influence their identity and social behaviour. This is particularly important considering that the patterns of law observance and acceptance of legal norms by young Poles abroad can impact their attitudes after returning to the country and their participation in public and political life.

The second perspective, the intercultural, should focus on how young Poles identify themselves in different cultural contexts and how this affects their attitude towards the law. This is key to understanding the processes of adaptation and integration. Young Poles living abroad often find themselves at the intersection of different cultures, which creates unique challenges and opportunities for identity formation. Studying these interactions allows for a better understanding of integration and acculturation processes. In this perspective, it is also important to study the relationship between identity and the legal order in a transnational context, which will enable a better understanding of global social phenomena such as migration and integration, and the formulation of responses to challenges associated with cultural diversity.

## Conclusions

The analysis of the results of the research allowed the following conclusions to be drawn:

1. The personal social identity of Polish youth in Ireland is linked to identifying oneself as Polish (89.4%), a family member (76.9%), European (68.3%), a person who cares about others (62.5%), a resident of a region, city or locality (52.9%) and a citizen of Ireland (48.1%). The survey results indicate that respondents' main identity indicators are linked to social identity, covering both Polish and Irish national aspects.
2. The identity traits of the young people analysed depend on their place of birth: those born in Ireland are more likely to identify as Irish than those born in Poland, which is obvious; the rationale for mentioning this is important for the holistic integrity of these research findings. By contrast, it is interesting to note that people born in Ireland are far more likely to characterise themselves with the following traits: they consider themselves as masters of their own destiny, as people with a future and as supporters of equality and social justice.
3. The personal identity traits of the Poles surveyed are only slightly related to the educational level of their parents: the sense of being the master of one's own destiny, the status of being of modest means and attachment to Polish

traditions are more often found in those whose parents have a higher education.

4. The social identity of Polish young people in Ireland is linked to family (94.2%), friends from an Irish school (76.9%) and friends from a Polish school (60.6%). The social identity defined as 'Poles in Ireland' is characteristic of more than half of respondents (56.7%). A similar situation applies to identification with the Polish nation (52.9%) and with the Irish nation (50.0%). These results, interpreted from the perspective of processes of building Poland's national security, should be considered unsatisfactory. At the same time, one can recognise in them a good starting point for systemic actions for taking responsibility for Poland among young Irish people of Polish descent.
5. To young Poles living in Ireland, the importance of the following elements of the legal order is key: complying with the law (94.2%), respecting human rights (89.4%), engaging in human rights activities around the world (81.7%), participating in general elections (62.5%) and taking part in peaceful protests against laws deemed unjust (59.6%).
6. The research carried out showed that respondents' opinions on selected aspects of the legal order are not linked to their sense of personal identity. Instead, they depend on their sense of social identity – for young Poles living in Ireland, feeling a sense of belonging with the group of teachers from an Irish school and respect for human rights is important. In contrast, respondents who identify with the community of believers (Catholics) consider it important to participate in general elections.
7. The results of the study confirm the belief that place of birth is an important variable for respondents. However, in the light of the other results obtained, further research should be postulated to investigate the impact of parental education, separately for young Poles born in Poland and those born in Ireland. This is because only such research can provide answers to the emerging questions concerning the reciprocal relationship between place of birth and parental education, and thus to questions concerning the social agency of these categories.

When thinking about the legal order and identity of Polish youth in Ireland, it is easier to answer the question 'unde venis?' (Eng. 'From where do you come?') than 'quo vadis?' (Eng. 'Where are you going?'). The study shows that the identity of Polish youth is multifaceted, combining a strong sense of Polishness with life in Ireland. Key elements of identification include a sense of belonging to the Polish nation, one's family and the larger European community, while recognising oneself as an Irish resident. The findings suggest that these identity traits are shaped by both place of birth

and educational context. Young Poles in Ireland also emphasise the importance of key elements of the legal order, such as respect for the law and human rights, which underscores their desire to be involved in socio-political life. It is interesting to note that there is no relationship between personal identity and opinions on the law, whereas social identity clearly influences such views, indicating a strong correlation between social identity and legal attitudes among young Poles in Ireland.

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## **Transformation of the Constitutional Identity in South Africa after the Fall of Apartheid**

**Abstract:** This article investigates the designed transformation of South African political identity and its constitutional framework as a core aspect of the democratization of South Africa. It compares the racist and exclusive identity of the apartheid state with a redesigned identity of an inclusive and open 'Rainbow Nation', a concept coined by Archbishop Desmond Tutu and spearheaded by Nelson R. Mandela along with the African National Congress. The study considers changes in the legal framework of identity politics, from the Republic of South Africa Constitution Act of 1983 (and the previous apartheid republican Constitution of 1961) through the interim democratic Constitution of 1993 to the Constitution of the Republic of South Africa of 1996. It discusses the possible significance of the 18 amendments to the act regarding South Africans' social and political identities, and establishes a complex and detailed portrayal of the republic's legal framework of identity politics. The study combines legal, political, and cultural analysis of the role of law in formatting social and political identities, using survey results to test its impact on society. In conclusion, the paper considers the effects of post-apartheid identity transformation in South Africa.

**Keywords:** apartheid, constitutional identity, democratization, Rainbow Nation

## Introduction

In December 2023, the application instituting proceedings against Israel before the International Court of Justice (ICJ) and the request for provisional measures (Judgment of the International Court of Justice, 2023) focused international attention on South Africa, inspiring contrasting opinions on its motivations and its respect for fundamental human values (Keitner, 2024). In the application, South Africa emphasized its legal and moral obligations to prevent genocide; Section 13, quoting the state's ambassador to the United Nations, referred to the South African identity and the painful heritage of apartheid as reasons to protest against Israeli actions in Gaza. The motivation resembles controversial references to national and constitutional identities in the European legal debate (see Corrias, 2016; Fabbrini & Sajó, 2019).

This article investigates the development of South Africa's constitutional identity as a core aspect of the nation's democratization process, comparing the apartheid identity of racial democracy, the interim transitional identity, and a democratic and inclusive identity designed in the Constitution of 1996. It follows Mazey's opinion that 'law shapes individual and group identity, social practices as well as the meaning of cultural symbols, but all of these things [...] also shape law by changing what is socially desirable, politically feasible, [and] legally legitimate' (2001, p. 46). Thus the paper considers constitutions as primarily cultural texts and applies the concept of constitutional identity as a theoretical framework for legal, political, and cultural analysis of identity politics. This approach follows a remark about the peculiarity of South African constitutionalism directly expressed in the Constitutional Court's jurisprudence, considering the law as a transformative means of political ethos (Judgment of the Constitutional Court of South Africa, 1995, para. 262).

### 1. The constitution and a legal framework of identity politics

Within its complexity, national identity integrates culture, heritage, religions, social structure, political community, and normative judgments, propagating core values as a root of the nation. Jacobsohn (2006, pp. 364–365) discusses the complex role of a constitution in identity politics, considering it a constitutive foundation of political and social relations in a community and thus an axiological 'constitution' of national identity. However, he argued that the act is more of a declarative ideation of the imagined community, and the national identity is entrenched in extraconstitutional cultural factors, suggesting that the strongest constitutional identities mirror the culture in their axiological foundations. In his later book, Jacobsohn (2010, pp. 12–13) explains the role of constitutions in identity politics as declarative (defining principles of the community), expressive (displaying codified declarations of the core values), and self-defining (mapping the topography of national identity).

Constitutional norms and their legal or ideological interpretations primarily express and explain the nation's core values, either developed from shared morality and normative judgments or produced in a constitution-making process by lawmakers or the judiciary (Śledzińska-Simon, 2015, p. 126). These constitutional core values define a unifying existential common ground and the essential homogeneity of a political community (Mahlmann, 2005, pp. 307–308). Therefore, the interpretation of constitutional core values is, in fact, a delimitation of national identity in the dialogue between cultural and legal norms (Polzin, 2017, p. 1597).

However, not all scholars appreciate the concept of constitutional identity; Fabbrini and Sajó (2019, pp. 468–470), in their critical review of its legal applications, argued that the influence of a constitution on identity politics inspires indeterminacy – as constitutional core values can be interpreted within the 'spirit' of the act – and arbitrariness – because political ideologies make the constitutional identity uncertain and variable. In conclusion, they state: 'Constitutional identity has increasingly become a weapon in the armory of apex national courts to resist the application of supranational law. [...] Constitutional identity suffers from a dramatic indeterminacy, which leads to arbitrary use. [...] It is due to this shortcoming that it is so easy to turn it into an arbitrary tool of judicial identity politics and populism' (2019, p. 472). However, their criticism does not neglect the relevance of constitutions in defining, codifying, mapping, or delimiting political identities, but they reject applying its politicized interpretations as an extraordinary source of law. The role of constitutional identity should, rather, have reverse logic, being considered as a means to influence society and its shared values (Rosenfeld, 2012).

## 2. South African constitutional identities

### 2.1. The exclusive identity of the apartheid state

In 1948, the Afrikaner-Boer nationalist Nasionale Party (NP) won the South African elections, rejecting racial equality (*gelykstelling*), a political franchise for non-white citizens, and promoting the politics of racial separation (apartheid). In the following years, the NP introduced legislation aimed at 'the drawing of a clear dividing line between white and non-white, thereby removing all possible causes of clashes of interest between white and non-white' (Welsh, 2009, p. 21), as declared in the Sauer Report. In practice, they established an oppressive, ultraconservative, and racist regime, as described by the 1984 Nobel Peace Prize laureate Archbishop Desmond Tutu:

Under apartheid, a small white minority had monopolized political power, which gave it access to all other kinds of power and privilege. It had maintained its tight control by vicious and immoral means. This white minority used a sys-

tem of ‘pigmentocracy’ to claim that what invested human beings with worth was a particular skin color, ethnicity, and race. Since these attributes were enjoyed by only a few, the pigmentocracy was exclusive to a limited number of [...] human beings. (2000, p. 10)

Apartheid South Africa was a country of deeply-rooted legal and political paradoxes. Its identity combined Protestant religious fundamentalism, white supremacism, and nationalism based in ‘acquired African indigeneity’ with republican constitutionalism and civil liberties (for white citizens only), integrating Western-style development with legalized racialism and gross human rights violations (Edwards & Hecht, 2010, pp. 619–620). Apartheid’s legal and political logic of separation and white racial superiority created an exclusive identity and culture, with a system of institutions socializing people into racial ideologies (Adam, 1995, p. 460). The idea of ‘separate development’ incorporated into the exclusive identity served merely as a philosophical facade for racial injustice and the exploitation of underprivileged ethnic groups (Taylor, 1990), deepening the paradox of formal democratic measures in a non-democratic state.<sup>1</sup>

The first apartheid republican constitution was enacted in January 1961, after a white-only referendum on the replacement of the Union of South Africa and leaving the Commonwealth was held in October 1960. Considering the unfavourable results of the referendum in the Natal and Cape provinces caused by opposition from anti-republicans and English speakers, the Constitution tried to combine Afrikaner nationalism with some British colonial heritage, as noticeable in the national symbols that were introduced. However, the Constitution mirrored the conservative ideology and identity of the Boers. The Preamble was deeply inspired by religious fundamentalism, political determinism, and intergenerationalism, establishing ‘a constitution best suited to the traditions of [...] the land’ to protect the integrity and freedom of the country, maintain law and order, and improve the spiritual and material welfare of the republic. The President’s Oath (Section 12) affirmed the same core values in its contents.

The 1961 Constitution established a ‘racial democracy’ with separated powers, self-governance, and the rule of law, with the government having exclusive control over the Bantu (black) administration and education. While members of the House of Assembly were elected in general elections (Section 41), the electoral system excluded non-white citizens, and only a white person was qualified to be a member of the parliament (Section 46). The Constitution introduced a republican state (Section 1) with the sovereign people ‘guided by God’ (Section 2). It did not include a bill of

1 The advancement of apartheid ideology in the South African legal system differentiated the nation from the political paths of Dutch and British societies, which shared cultural roots with the white South African community.

rights, though, nor were democracy, pluralism, and human rights mentioned in its contents. Moreover, it covered freedom of speech only when considering the provincial authorities (Section 75) and did not directly guarantee rights and freedoms to citizens. Equality referred only to the equal status of English and Afrikaans as the state's official languages, marking the limits of the exclusive identity.

In 1983, the South African parliament enacted the second constitution of the apartheid era, which followed the ideological framework of identity politics established in 1961 and its inspiration in religious fundamentalism, political determinism, and intergenerationalism. The Preamble listed the goals of the new constitution, again including the country's integrity and freedom, maintenance of law and order, and improving the welfare of all (but primarily white) citizens, but also adding the protection of the separation of powers and the rule of law, guarding human dignity, life, liberty, and property, upholding Christian values and 'civilized norms' (with freedom of religion emphasized), developing a free-market economy, and supporting the self-determination of the people. However, it applied self-determination in an illiberal context as a legal justification for semi-independent Bantustans (Transkei, Bophuthatswana, Venda, and Ciskei), granted autonomy on the grounds of the 1971 Bantu Homelands Constitution Act.

The major political shift in the 1983 Constitution was the Tricameral Parliament, franchising Coloured and Indian communities, with the House of Assembly for white members (Section 41), the House of Representatives for Coloureds (Section 42), and the House of Delegates for Indians (Section 43); however, it excluded any representation of black Africans.<sup>2</sup> The denial of black representation was akin to the 1980 President's Council, which replaced the Senate with members representing whites, Coloureds, Indians, and the Chinese, but not the black communities of South Africa. Thus the legal and political transition of the racial democracy did not affect the majority of South Africans, who were still deprived of political representation. Discussing the Constitution in 1987, Jisheng noted that 'through the adoption of the 1983 constitution, the South African authorities intend to improve their image [...] to further consolidate racist rule. [...] The resistance of the blacks, Coloureds, and Asians is still in progress, and strong condemnations come from the international community' (1987, p. 22).

Austin emphasized the facade of the democratic shift in the apartheid regime and the lack of change in authoritarian policies, describing how 'the rhino whip [a type of police baton, *sjambok*], tear gas, sneeze machines, plastic bullets, real bullets, detention orders, arrests, stone-throwing, petrol-bombs, and concerted abuse – all the familiar accompaniments of non-White protest and police reaction – welcomed the dawn of *consociational* democracy' (1985, p. 194). Analysing the 1983 Constitution,

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2 While the term 'coloured' is considered offensive in many parts of the world, it is accepted within South Africa to describe people of mixed race (see Adhikari 2005)

Toit and Heymans concluded that the ‘basic lesson is that peaceful transformation will not come from constitutional models but from the power that can be mobilized by those who seek change and the extent to which such power is used peacefully’ (1985, p. 84). Constitutional reform of apartheid was impossible because of its deeply rooted exclusive identity and the illiberal nature of Afrikaner nationalism; however, it took four years to open informal negotiations between the government and the banned African National Congress (ANC), including the imprisoned Nelson Rolihlahla Mandela, and four more to open the Convention for Democratic South Africa (CODESA 1) with political representation of the regime and the opposition (Marszałek-Kawa et al., 2017, pp. 167–168).

## 2.2. The interim democratic constitution of 1993

Inaugurated on 20 December 1991, CODESA 1 was the first attempt to formalize multi-party negotiations about a future democratic settlement and end the disturbing violence in South Africa, signified by a constitution reached by consensus. It was attended by several political organizations, most notably the ANC, the NP, and Joe Slovo’s South African Communist Party. However, not all significant parties entered the initial constitutional debate: the white Conservative Party, the black consciousness movement’s Azania People’s Organization, and the radical Pan-Africanist Congress boycotted the summit for varying reasons. After a deadlock between the ANC and the NP, on the majority needed to make constitutional changes, led to the failure of CODESA 2 in 1992, it became clear that the democratization of South Africa depended on compromise between the progressive wing of the NP and the mainstream of the ANC.

This compromise came through the transitional constitution, mainly a consensus between the Afrikaner progressives and the ANC leadership. In many ways, the document was an ANC–NP negotiated settlement, complete with contributions from the smaller parties present – including the Zulu secessionist Inkatha Freedom Party (Marszałek-Kawa et al., 2017, pp. 170–172) that Scher (2010, pp. 4–5) notes had been brought back to the negotiating table thanks to a series of concessions by the ANC and NP. The transitional constitution blended Mandela’s idea of a non-racial society, Tutu’s vision of reconciliation based on the truth, and Slovo’s controversial ‘sunset clause’ that protected the interests of the white minority and some privileges of the apartheid apparatus. As a result, the idealism of anti-apartheid leaders and the non-racial and inclusive project of the Rainbow Nation was bridged with the pragmatism of Afrikaner nationalists, who were guarding white economic and political privileges. This shift was noticeable during the Multi-Party Negotiating Process in 1993, which reached an agreement in July, and the Interim Constitution was enacted by the Tricameral Parliament (Barnes & De Klerk, 2002, pp. 27–29). Its Preamble presented the motivations of the negotiators, listing the creation of a new democratic order based on equality, the protection of the human rights of all citizens, the promo-

tion of national unity, and the restructuring of the South African government. A pivotal inclusion was Section 6, which offered a political franchise to all adult citizens, entitling them to vote in elections and referenda. For the first time in the nation's history, the constitutional identity included equal electoral rights, formally ending the colonial and apartheid oppression of black citizens.

Notably, the Interim Constitution was the first in South African history to introduce a bill of rights. Despite the attempts of the democratic opposition, the apartheid Constitution of 1983 did not include formal protection of human rights, even those limited to white citizens. The act of 1993 covered fundamental rights in its third chapter, in 29 sections; the list included equality and non-discrimination as the core values of the democratic society (Section 8), numerous civil, political, economic, environmental, and cultural rights, including children's rights (Section 30), and the rights of those detained, arrested, and accused (Section 25).

The Interim Constitution mentioned democratic values in the Preamble and referred to democracy in further sections, including 'an open and democratic society based on freedom and equality' (Sections 26, 33, and 35), democratic election of local government (Section 179), the state's responsibility for the wellbeing of anti-apartheid heroes (Section 189), and the call for reconciliation in the final provision, 'National Unity and Reconciliation'. This provision offers an insight into the projected constitutional identity, as it emphasizes human rights, democracy, peaceful co-existence, equal development opportunities, national unity, reconciliation, humanitarian principles, and 'a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimization' as core values of the inclusive and democratic South African society. Schedule 4, which included the constitutional principles of South Africa, influenced the new constitutional identity. It discussed the state's sovereignty, equality, non-discrimination, protection of human rights, language and minority rights, the rule of law, separation of powers, the judiciary's independence, democratic representation, multi-party elections, self-governance, civil society, traditional leadership, trade unionism, openness and freedom of information, and self-determination of the people, along with the political franchise to all adult citizens, constituting the core values of democratic South Africa.

The Interim Constitution allowed the country's first democratic elections in April 1994. Seven political parties won national representation, with Mandela's ANC gaining 62.6% of the vote and 252 seats in the Parliament, the National Party 82 seats, and Inkatha 43 seats. The Freedom Front (9 seats), the Democratic Party (7 seats), the Pan-Africanist Congress (5 seats), and the African Christian Democratic Party (2 seats) also had their representatives as members of the House of Assembly (Lodge, 1995, pp. 471–472). The newly established democratic parliament became a central institution for negotiating the post-transitional constitution to replace the interim act and enhance democratic governance. The ANC-dominated assembly faced the challenge of creating a more permanent constitution that would realize the principles of

the Interim Constitution, continue the post-apartheid transformation, and balance the ideological impact of political parties with a pragmatic equilibrium to reach constitutional and political stability (Kotzé, 1996, p. 156).

### 2.3. A democratic and inclusive identity

The 1996 Constitution of the Republic of South Africa was a milestone in the nation's history of democratic legislation and identity politics. It was adopted by the first fully democratically elected South African parliament and promulgated by its first democratic president, and the icon of the anti-apartheid resistance, Nelson Rolihlahla Mandela. Replacing the transitional Interim Constitution, the act was an ambitious attempt to unify the conflicted society and introduce a utopian vision of reconciliation based on human rights, tolerance, and democratic values, permanently establishing the legal framework of the Rainbow Nation identity. Sauter noted that the South African Constitution:

described as one of the most liberal in the world, [...] outlaws racial discrimination, guarantees full rights for gays and lesbians, [...] and has separate sections on rights for children and prisoners. It solidifies South Africa's new political order by scrapping the interim multi-party government and guaranteeing multi-party parliamentary election. This was a shining moment for South Africa. [...] The South African Constitution is not just a legal document, but a rhetorical document. (2015, p. 190)

In a 1995 judgment, the Constitutional Court agreed that the Constitution is the nation's principal law and its moral and ethical guidelines (Malherbe, 2000, p. 65; see Judgment of the Constitutional Court of South Africa, 1995).

The political objective of the act was straightforward. After the Constitutional Assembly adopted the final text on 6 May 1996, its chairperson, Cyril Ramaphosa, declared:

[it] is the mirror of South African society. It reflects [...] the history from which we have emerged and the values we now cherish – human dignity, equality, and freedom. It celebrates the richness of the diversity of cultures, religions, and beliefs of South Africans and affirms that all belong as equals in our one nation. [...] Through this constitution, we hope to transform our society from one based on injustice and strife to one based on justice and peace. (Quoted in O'Malley, 1996)

However, as the democratic continuation of the negotiated settlement, the Constitution followed an idealistic belief that the law and institutions might redefine social structures and promulgate *any* political identity adopted by the lawmakers. Thus, it delivered the vision of an imagined future; however, it did not address the historical

roots of South African injustices and inequalities, which are closely linked to colonization and to what Ramose (2018) called the doctrine of discovery, which allowed and protected the unjust acquisition of economic power via large-scale theft of land and natural resources by Britain and then the apartheid regime.

The 1996 Constitution is a developed and detailed document precisely defining political and legal systems, public institutional networks, and core values of the democratic state. In 14 chapters, it established a modern and liberal democracy, with justice, inclusiveness, and the protection of human rights as its focal points. The Preamble indicates the political motivations of the lawmakers, emphasizing recognition of historical injustices, remembrance of national heroes, and a future-oriented belief in ‘a nation united in its diversity’. It clarifies core values, listing democracy, the rule of law, personal freedom, human rights, self-determination of the people, sovereignty, social justice, and an open society. Therefore, it defined a progressive legal framework for a political vision of the inclusive Rainbow Nation; however, its focus on the idealistic imagined future omitted the inevitable obstacles of racial, social, and economic disparities rooted in colonialism and apartheid (Sall, 2018, p. 2).

Section 1 declares that democratic South Africa is founded on human dignity, equality, human rights and freedoms, non-racialism and non-sexism, constitutionalism and the rule of law, free elections, and universal adult suffrage. The equality of all citizens is further detailed in Section 3, establishing a legal framework for inclusive political identity. The Founding Provisions mention the protection of language rights, including the indigenous languages of South Africans, and declares 11 official languages of the state to be equal (Article 6). The second chapter of the Constitution portrays the imagined inclusive and democratic society in the progressive Bill of Rights, considered ‘a cornerstone of democracy in South Africa’ (Section 7(1)). The core values and protected rights are extensive, including:

- civil rights: equality (Section 9),<sup>3</sup> inherent dignity (10), the right to life (11), individual freedom and security (12), prohibition of slavery and forced labour (13), freedom of religion, belief, and opinion (15), freedom of expression (15) and assembly (16), and children’s rights (28),
- political rights: freedom of association (Section 17), multi-party representation and free elections (18), access to public information (32), a just administration (33), access to independent and impartial courts (34), fair treatment of arrested, detained, and accused persons, and their fair trial (35),
- economic rights: fair labour practices (Section 23), the right to a healthy and protected environment (24), protection of private property (25), and access to adequate housing (26),

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3 The Constitution protects equality as a non-derogable right, concerning discrimination solely on race, colour, ethnic or social origin, sex, religion, or language (see Table of Non-Derogable Rights, Section 37).

- cultural rights: the right to education (Section 29), and language and religious rights (30 and 31).

The Bill of Rights bridged the legal framework of democracy with the promulgated identity politics of the Rainbow Nation and its narratives on a non-racial and inclusive society, a shared heritage, a peaceful transformation based on equality, and reconciliation achieved through truth and fairness (Wawrzynski et al., 2015, p. 26). However, it failed to support the interpretation of democratization as a final stage of decolonization, placing the protection of private property over economic empowerment and agreeing with the doctrine of discovery. Without addressing the historical roots of social injustices, the vision of the Rainbow Nation (and its constitutional framework) was not able to prevent the cementing of racial stereotypes and inequalities, diminishing democratic progress in South Africa (Montle, 2020).

The third chapter offers principles of cooperative governance, emphasizing the role of self-governance and the interdependence of authorities (Section 40). The authorities are responsible for the maintenance of peace and national unity, securing the wellbeing of the people, and respecting the constitutional order (Section 41). As detailed in Section 83, the president is primarily accountable for defending the Constitution and promoting national unity, becoming a central institution of the nation's identity politics. The Constitution established the Human Rights Commission to promote, monitor, and assess the protection of rights in South Africa (Section 184) as a supporting democratic institution involved in identity politics. Similar functions were designated to the Commission for the Promotion and Protection of the Rights of Cultural, Religious, and Linguistic Communities (Section 185) and the Commission for Gender Equality (Section 187). Moreover, the Electoral Commission was declared responsible for free and fair elections, and the broadcasting authority was accountable for media fairness (Section 192).<sup>4</sup>

The 1996 Constitution introduced a liberal democratic and inclusive framework for the new political identity of South Africans, continuing the path of the negotiated settlement and the transitional ideology of a nation united in its diversity. Focusing on equality and human rights protection, it has not delivered applicable guidelines for overcoming the economic and social legacy of apartheid. The lawmakers hoped to achieve an identity transformation with legal measures. Nevertheless, as progressive as it is, the Constitution has not addressed the historical roots of South African injustices and inequalities, declaring formal equality but not offering the means to accomplish the objectives in a racially divided and conflicted society. Therefore democracy in South Africa inherited a pivotal obstacle to its progress from the transitional ne-

4 The broadcasting authority was then the Independent Broadcasting Authority (1993–2000), and since 2000 has been the Independent Communications Authority of South Africa.

gotiated settlement – liberal property rights benefiting apartheid elites and predominantly white property owners (Welsh, 2009, p. 578).

#### **2.4. Amendments to the 1996 Constitution**

The South African parliament has amended the act 18 times, but the changes have limited influence on the constitutional identity of core democratic values. The most controversial issue has been understanding voters' political representation, affecting changes in floor-crossing legislation in national and provincial legislatures. The Eight and Ninth Amendments of 2002, followed by the Tenth Amendment of 2003, introduced after the ruling of the Constitutional Court on the Loss or Retention of Membership of National and Provincial Legislatures Act, 2002, allowed members to change political affiliation without losing their seats under some circumstances. However, the changes were repealed in the Fourteenth and Fifteenth Amendments of 2008, which came into force in April 2009.

The legal and political debate over floor-crossing influenced constitutional identity in South Africa, answering the question of whether voters are represented by individual members of the legislature or by political parties that gained their support during elections. The Constitution protects parties as an essential means of civic power over the government and people's principal representation in national and local politics. In practice, floor-crossing promoted stronger parties (the African National Congress and the Democratic Alliance), weakening citizens' trust in democratic procedures and institutions; thus it was discussed as a threat to democratic consolidation (Hoeane, 2008; Kanego Masemola, 2007).

The Constitution emphasized the significance of self-determination and the self-governance of the people. While the Third Amendment of 1998 aimed at increasing civic influence on self-governance, introducing in the new Subsection 6A of Section 155 a highly democratic option to establish a municipality extending across provincial boundaries, the change was reversed in the Twelfth Amendment of 2005. In 2001, the Seventh Amendment increased the government's financial control over provincial authorities. More significant were the consequences of altering provinces' boundaries in the same Twelfth Amendment; it resulted in the Matatiele Municipality case against the president in the Constitutional Court (see Nyati, 2008) and the Thirteenth Amendment of 2007 confirming the transfer of the municipality from KwaZulu-Natal to the Eastern Cape. Moreover, the transfer caused prolonged civic protests and political opposition (including a boycott of the 2006 local elections) in Khutsong, Merafong City Municipal Area, which was retransferred to Gauteng from North West Province in the Sixteenth Amendment of 2009 (see Matebesi & Botes, 2011), ending the conflict and proving the significance of the constitutional rule of people's self-determination.

The third issue covered in constitutional amendments was the separation of powers and the judiciary's independence. The Sixth Amendment of 2001 strength-

ened the judiciary's authority in the state, symbolically renaming the president of the Constitutional Court as Chief Justice. From 2013, the Seventeenth Amendment increased the role of the Chief Justice in the judiciary system and consolidated the High Court of South Africa, reinforcing the constitutional independence of the courts. However, despite its political position and identity politics, the South African judiciary failed to gain public trust in its fairness, with a level of distrust at 53% in 2021, compared to 27% in 2006 (Moosa & Hofmeyr, 2021, p. 8).

The latest amendment, adopted on 2 May 2023, introduced South African Sign Language as an equal official language of the state, gaining the same status and legal protection as Afrikaans, English, isiNdebele, isiXhosa, isiZulu, Sepedi, Sesotho, Setswana, siSwati, Tshivenda, and Xitsonga. However, the legislation has not yet come into force.

## Conclusion

South African democratization attempted a broad reconstruction of the conflicted society, inspiring a transition from the exclusive identity of apartheid racial democracy to the inclusive identity of the Rainbow Nation based on equality, non-racialism, reconciliation, and human rights protection. However, South African democratic identity inherited a transitional 'sunset clause' following the doctrine of discovery (Ramosé, 2018), in the Bill of Rights, which liberally protected private property. It has caused inevitable conflict between the designed democratic equality and economic inequalities rooted in colonialism and apartheid. In the fifth volume of its report, the Truth and Reconciliation Commission addressed this conflict, suggesting that 'reconciliation requires a commitment, especially by those who have benefited and continue to benefit from past discrimination, to the transformation of unjust inequalities' (1998, p. 435).

A 2022 World Bank report indicated high and persistent economic inequalities in South Africa, compared with Southern African and developing nations, with a Gini coefficient of 66.96 (68.4 in 2001). This results from the social legacy of apartheid and the historically unjust distribution of ownership, but also from unequal access to education and professional training. However, the report emphasized that 'race was the largest contributor to inequality in South Africa, with its contribution rising over time. [...] Race remains a key driver of South Africa's high inequality of opportunity, largely because of its influence on the education and labour market pathways to better outcomes' (2022, p. 22). Therefore equality in South Africa is rather declarative than self-defining or expressive, and economic inequalities constitute the nation divided by race (see Nattrass & Seekings, 2001).

The latest South African Reconciliation Barometer Report praised the nation's progress from the systemic violence of colonialism and apartheid to a diverse and

democratic society. However, the survey showed decreasing trust in democratic leadership, with distrust among 79% of participants, compared to 18% in 2003, and lowered confidence in national democratic institutions and the judiciary (Lefko-Everett, 2023, pp. 13–14). Simultaneously, South Africans believe in democracy, expressing active electoral attitudes and political participation; considering the growing support for the radical Economic Freedom Fighters, it suggests there is increasing rejection of post-transitional elites and negotiated democratic settlement.

Though economic inequalities fuel the radicalization of South Africans, they do not cause rejection of the constitutional identity and its core values. The Institute for Justice and Reconciliation (IJR) report proved the increasing commitment to forgiveness and reconciliation, but more ambiguous attitudes to redistribution (reparations and compensation) and memory politics. Still, racial reconciliation is not universal, and in the last two decades, the involvement of white, Indian, and Asian citizens has decreased (Institute for Justice and Reconciliation, 2023, pp. 29–30). Moreover, economic inequalities were considered a principal barrier to further integration. Almost half of South Africans consider their society divided, while less than a third see it as unified; however, a need for unity remains strong among black citizens, has increased in white, Indian, and Asian participants, and is only lower among the Coloureds (Institute for Justice and Reconciliation, 2023, p. 36). Therefore, the core South African democratic values – equality, reconciliation, and unity – continue to inspire the populace, mirroring the designed constitutional identity.

Three decades after the democratic transformation, the legacy of apartheid remains a significant aspect of political, social, and economic relations in South Africa. Despite increasing mistrust in democratic leadership and institutions, South Africans maintain their democratic identity and believe in core constitutional values – equality, reconciliation, unity, and human rights protection. While the nation is far from realizing the concept of an inclusive and non-racial Rainbow Nation, its constitutional identity continues to serve as a framework for an imagined future, inspiring the belief in a nation united in its diversity, as is noticeable in the results of the IJR survey. Moreover, the dispute over the Twelfth Amendment proved that South African constitutional identity might prevail over political interests, while the ICJ application against Israel suggests that it influences strategic decision-making in state affairs.

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